Here, Ms. Franco has presented reasonable evidence of physical abuse against transgender people who have been singled out in Honduras. Ms. Franco recounted for the Immigration Judge that her good friend was arrested, detained, and badly beaten while in the custody of the Honduran National Police. Additionally, the record also includes the abuse that LGBTI people face generally, including hate crimes, physical violence, and killings that does not appear to affect the entire nation. These actions are like those in Begzatowski where Albanian soldiers were physically abused and used as human shields, because these actions show that LGBTI and transgender people are singled out in Honduras.

The government asserts that the entire Honduran population will be granted asylum based on country conditions. This is simply not the case. The record is clear that LGBTI and transgender people are singled out in Honduras. Further, Ms. Franco herself has been subjected to dangerous conditions including being assaulted with a glass bottle after being threatened and sexually assaulted. Because these actions are sufficiently life threatening to Ms. Franco and indicate that transgender persons are singled out, they rise above mere harassment and are in fact persecution.

Because the harm experienced by Ms. Franco rises to the level of persecution, the BIA's ruling is not supported by substantial evidence. Thus, this Court should reverse and remand the BIA's ruling that Ms. Franco has not suffered past persecution.

B. Ms. Franco has established a well-founded fear of future persecution based on a pattern or practice of persecuting transgender persons that has been tolerated and perpetrated by state actors.

Ms. Franco has a sufficient well-founded fear of future persecution because she has established a pattern or practice of persecution against Honduran LGBTI persons that has been

both tolerated and perpetrated by state actors. Therefore, this Court should reverse and remand the BIA's ruling that Ms. Franco did not have a well-founded fear of future persecution.

Where the petitioner has established past persecution, there is a rebuttable presumption of a well-founded fear of future persecution. Begzatowski, 278 F.3d at 669. A petitioner may also establish a stand-alone well-founded fear of future persecution. 8 C.F.R. § 208.13(b). A well-founded fear of future persecution requires Ms. Franco to show both a genuine, subjective fear of persecution and that an objectively reasonable person in Ms. Franco's circumstances would fear persecution if returned to Honduras. Sivaainkaran, 972 F.2d at 163. Here, based on Ms. Franco's credible testimony about her subjective fear, only the objective component is at issue. R. at 5.

The objective component requires Ms. Franco to show that (1) there is a reasonable possibility that she would be singled out or (2) that there is a pattern or practice of persecution of an identifiable group to which the petitioner belongs. Ayele, 564 F.3d at 868. Membership in a group that faces a high probability of persecution is enough to establish a risk of persecution if the petitioner is deported to that country. Velasquez-Banegas v. Lynch, 846 F.3d 258, 261 (7th Cir. 2017).

The showing of "pattern or practice" need not be definite or even likely, there must only be a reasonable possibility of persecution. Ayele, 564 F.3d at 868. In Ayele, the Court found the applicants familial membership the strongest basis for persecution. Id. at 869. The applicant's family was well known for their political involvement and all members of the applicant's immediate family were either exiled, had disappeared, been imprisoned, tortured, or was under house arrest. Id. at 870. This Court held that because every member of the applicant's immediate family was subjected to persecution there was a reasonable possibility of a "pattern or

practice" of persecuting members of the applicant's family. Id. at 869. In Ayele, the Immigration Judge failed to fully analyze this pattern, thus remand was warranted. Id.

Here, as a transgender woman, Ms. Franco can establish a reasonable possibility of persecution of members of the LGBTI community in Honduras. Like in Ayele, where the applicant's family was imprisoned and tortured there is ample evidence of similar incidents here. In Honduras, members of the LGBTI community are subjected to discrimination, physical violence, and killings. More specifically, seven LGBTI individuals were killed in a two-month period and 16 hate crimes were reported over a nine-month period. Additionally, Ms. Franco is close friends with a transgender woman who was detained for a week by the Honduran National Police and beaten resulting in a black eye and large welts. This persecution, like that in Ayele where various immediate family members were persecuted, is sufficient to establish a "pattern or practice" of persecution because it has happened to multiple members of the LGBTI community including some who are close to Ms. Franco. Thus, establishing a reasonable possibility of persecution of LGBTI persons. Further, like Ayele, the Immigration Judge failed to fully analyze these facts, thus warranting remand.

To establish a pattern or practice of persecution "[t]here must be a systematic, pervasive, or organized effort to kill, imprison, or severely injure members of the protected group, and this effort must be perpetrated or tolerated by state actors." Mitreva, 417 F.3d at 765 (quotation omitted). In Mitreva, the applicant was a member of the Roma ethnicity. Id. at 762. The applicant relied on the human rights report to show a systematic, pervasive, or organized effort that Roma persons were subjected to attacks by private citizens, arbitrary arrests, and beatings by police officers. Id. at 765. This Court held that the BIA's ruling was supported by substantial evidence because although the treatment of Roma persons was unpleasant, the State

Department's country report indicated that anti-Roma violence was declining, and the incidents of police harassment appeared to be isolated. Id. Further, this Court held that because the local government had taken serious efforts at reform, including an affirmative action policy and an anti-discrimination statute, the persecution was not perpetrated or tolerated by state actors. Id. at 766.

Unlike Mitreva, where the record indicated that there was a reduction in violence, there is no indication that violence against transgender persons in Honduras has decreased, in fact the opposite is true. Also, there has been no serious government efforts at reform like those in Mitreva where policy and statutory changes were made. The Honduran government has done nothing more than issue a statement on social media and investigate the crimes. There has been a hate crime amendment in Honduras but violence against LGBTI persons persisted after this.

Furthermore, Ms. Franco can establish a "systematic, pervasive, or organized" effort to kill and severely injure members of the LGBTI community that is perpetrated and tolerated by state actors. The United States Department of State Honduras 2019 Human Rights Report and 2020 Human Rights Watch Report illustrate the horrible persecution that LGBTI and transgender persons face in Honduras. Local media and numerous LGBTI human rights non-governmental organizations have reported that violence against transgender persons is on the rise in Honduras. Specifically, there have been 16 reported hate crimes against transgender women in a nine-month period. In fact, between June and July seven LGBTI persons were killed. Honduras is also known to have the highest rate of murders of transgender people in the world. Because there are numerous crimes of the same sort against LGBTI and transgender persons this indicates at least an organized effort against these groups.

With an increase in physical violence and killings against LGBTI and transgender persons along with a minimal response from the Honduran government this demonstrates a pattern or practice of persecution against LGBTI and transgender persons that is perpetrated and tolerated by state actors. Thus, Ms. Franco can establish a well-founded fear of future persecution and this Court should reverse and remand the BIA's ruling.

CONCLUSION

For all of the forgoing reasons, petitioner-appellant Berta Franco respectfully requests that this Court reverse the judgment below and remand for further consideration.

Applicant Details

First Name	**Lily**
Middle Initial	**M**
Last Name	**Fagin**
Citizenship Status	**U. S. Citizen**
Email Address	**lily.fagin@law.nyu.edu**
Address	**Address** Street **123 Waverly Place, #1E** City **New York** State/Territory **New York** Zip **10011** Country **United States**
Contact Phone Number	**5166409658**

Applicant Education

BA/BS From	**Dartmouth College**
Date of BA/BS	**June 2016**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 20, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Review of Law and Social Change, Executive Editor**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Francis, Daniel
daniel.francis@law.nyu.edu
212-998-6425

Estlund, Cynthia
cynthia.estlund@nyu.edu
212-998-6184

Archer, Deborah
deborah.archer@nyu.edu
212-998-6528

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Lily Fagin
123 Waverly Place
New York, NY 10011
Lily.fagin@law.nyu.edu
(516) 640-9658

March 27, 2023

The Honorable Jamar K. Walker
U.S. District Court
Eastern District of Virginia
600 Granby St.
Norfolk, VA 23510

Dear Judge Walker,

I am a student at the New York University School of Law and write to apply for a clerkship in your chambers during the 2024-25 term or any subsequent term. Following graduation, I will be an associate at Skadden, Arps, Slate, Meagher & Flom in New York.

Please find my resume, writing sample, and transcript attached. My writing sample is a memorandum that I prepared as part of my work in the Civil Rights Clinic. My application also includes letters of recommendation from Professors Daniel Francis, Cynthia Estlund, and Deborah Archer. I took Professor Francis's antitrust course in fall 2022. I took Professor Estlund's property course in fall 2022 and her seminar, *Regulating Work Beyond Employment*, in spring 2021. In the seminar I authored a paper exploring extending the statutory labor exemption to federal antitrust laws to include coordination among non-employee gig workers. Professor Archer supervised my work in the Civil Rights Clinic from fall 2021to fall 2022.

Daniel Francis | NYU School of Law | daniel.francis@law.nyu.edu | (212) 998-6425

Cynthia Estlund | NYU School of Law | cynthia.estlund@nyu.edu | (212) 998-6184

Deborah Archer | NYU School of Law | deborah.archer@nyu.edu | (212) 998-6473

Through my work in the Civil Rights Clinic, at Skadden, and at the legal nonprofits Centro de los Derechos del Migrante and Her Justice, I have gained substantial exposure to a range of processes relevant to litigation. I am deeply enthusiastic about the prospect of clerking for you. I would be delighted to answer any questions you may have about my application. Thank you for your consideration.

Respectfully,

/s/
Lily Fagin

LILY MADELINE FAGIN

123 Waverly Place #1E New York, NY 10011 | (516) 640 – 9658 | Lily.fagin@law.nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2023
Unofficial GPA: 3.70
Honors: Robert McKay Scholar – top 25% based on cumulative average after four semesters
Review of Law and Social Change, Executive Editor
Activities: Teaching Assistant to Professor Maggie Blackhawk, Constitutional Law, Spring 2023
Teaching Assistant to Professor Daniel Capra, Evidence, Fall 2022
Law Students for Economic Justice, Board Member, April 2021 – April 2022
Research Assistant to Professor Helen Hershkoff, Civil Procedure, Summer 2021

DARTMOUTH COLLEGE, Hanover, NH
B.A. in History, *cum laude*, June 2016
Honors: James O. Freedman Presidential Scholar – *selected for paid research assistantship*
Activities: Student and Presidential Committee on Sexual Assault, Policy Chair
Outing Club, First-Year Trips Student Leader
Study Abroad: Universitat de Barcelona, Spanish Language Study Abroad Program, Spain, winter 2014

EXPERIENCE

SKADDEN ARPS SLATE MEAGER & FLOM, New York, NY
Associate, beginning September 2023; *Summer Associate,* May 2022 – July 2022
Researched issues and wrote memoranda related to ongoing securities, antitrust, and mass tort litigation, as well as pro bono initiatives. Assisted with deposition preparation. Returning to join the mass torts practice group.

CIVIL RIGHTS CLINIC, New York, NY
Student Advocate, September 2021 – December 2023
Initiate nationwide impact litigation and policy projects related to racial and reproductive justice. Clinic was awarded the NAACP foot soldier award for litigation and advocacy. Represented employment discrimination plaintiff in a mediation before the New York City Commission on Human Rights.

CENTRO DE LOS DERECHOS DEL MIGRANTE, Mexico City
Summer Law Clerk, June 2021 – August 2021
Researched issues and wrote memoranda related to ongoing litigation on behalf of migrant workers in the United States. Conducted bilingual intakes and investigative interviews with workers to assess potential legal violations. Researched available remedies and assisted workers in preparing complaints to administrative agencies.

HER JUSTICE, New York, NY
Legal Assistant, April 2019 – June 2020
Provided wide range of legal and administrative support in the areas of family, divorce, and immigration law. Conducted bilingual intakes and advised clients on legal processes and available resources.

SUCCESS ACADEMY CHARTER SCHOOLS, Brooklyn, NY
Humanities Lead Teacher, July 2016 – June 2018
Taught History and English to students from traditionally underserved neighborhoods.

SOUTHWEST CENTER FOR LAW AND POLICY, Tucson, AZ
Dartmouth Partners in Community Service Fellow, June 2015 – September 2015
Designed programs, wrote policy briefs, and drafted protocol related to sexual assault in Indian Country. .

BRIDGEWATER ASSOCIATES, Westport, CT
Investment Associate Intern, January 2015 – March 2015
Participated in Socratic-style class and conducted independent research on macroeconomic themes.

LANGUAGES

Fluent Spanish speaker, writer, reader trained in best practices in legal interpretation.

Name: **Lily M Fagin**
Print Date: **06/01/2023**
Student ID: **N11012580**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2020

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: David Simson			
Torts	LAW-LW 11275	4.0	B
Instructor: Eleanor M Fox			
Procedure	LAW-LW 11650	5.0	B
Instructor: Helen Hershkoff			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Kevin E Davis			
1L Reading Group	LAW-LW 12339	0.0	IP
Topic: Tax, Race, and Class			
Instructor: Daniel N Shaviro			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2021

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	A-
Instructor: Trevor W Morrison			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: David Simson			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B+
Instructor: Adam B Cox			
Criminal Law	LAW-LW 11147	4.0	A
Instructor: Avani Mehta Sood			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Daniel N Shaviro			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2021

School of Law
Juris Doctor
Major: Law

Civil Rights Clinic Seminar	LAW-LW 10559	4.0	A
Instructor: Deborah Archer, Johanna E Miller			
Civil Rights Clinic	LAW-LW 10627	3.0	A-
Instructor: Deborah Archer, Johanna E Miller			
Evidence	LAW-LW 11607	4.0	A
Instructor: Daniel J Capra			
Research Assistant	LAW-LW 12589	1.0	CR
Summer 2021 Research Assistant			
Instructor: Helen Hershkoff			
Class Actions Seminar	LAW-LW 12721	2.0	A-
Instructor: Jed S Rakoff			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2022

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	A-
Instructor: Samuel Issacharoff, Arthur R Miller			
Civil Rights Clinic Seminar	LAW-LW 10559	4.0	A
Instructor: Deborah Archer, Johanna E Miller			
Civil Rights Clinic	LAW-LW 10627	3.0	A-
Instructor: Deborah Archer, Johanna E Miller			
Regulating Work Beyond Employment Seminar	LAW-LW 12513	2.0	A
Instructor: Cynthia L Estlund, Mark D. Schneider			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	57.0	57.0

McKay Scholar-top 25% of students in the class after four semesters

Fall 2022

School of Law
Juris Doctor
Major: Law

Antitrust Law	LAW-LW 11164	4.0	A
Instructor: Daniel S Francis			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Daniel J Capra			
Property	LAW-LW 11783	4.0	A
Instructor: Cynthia L Estlund			
Advanced Civil Rights Clinic	LAW-LW 12805	2.0	A
Instructor: Joseph Schottenfeld			
Advanced Civil Rights Clinic Seminar	LAW-LW 12806	1.0	A
Instructor: Joseph Schottenfeld			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	70.0	70.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Post Conviction	LAW-LW 10104	4.0	A-
Instructor: Emma M Kaufman			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A-
Instructor: Joseph E Neuhaus			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Maggie Blackhawk			
Federal Courts and the Federal System	LAW-LW 11722	4.0	A
Instructor: Helen Hershkoff			
Review of Law & Social Change	LAW-LW 11928	2.0	CR

	AHRS	EHRS
Current	14.0	14.0
Cumulative	84.0	84.0

Staff Editor - Review of Law & Social Change 2021-2022
Executive Editor - Review of Law & Social Change 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

NYU | LAW

DANIEL FRANCIS
Assistant Professor of Law

NYU School of Law
40 Washington Square Park South
New York, NY 10012

daniel.francis@law.nyu.edu

March 13, 2023

Dear Judge Walker,

I write, delightedly, to recommend Lily Fagin to you for a judicial clerkship. She is a genuine star: brilliant, incisive, thoughtful, articulate, and collegial. I can't recommend her highly enough, and I would hire her unhesitatingly for a high-stakes entry-level legal position of virtually any kind. She will be a tremendous asset to any chambers lucky enough to have her on the team.

My name is Daniel Francis. I am an Assistant Professor of Law at NYU Law, where I teach antitrust. (I previously served for three years in the Federal Trade Commission, and practiced antitrust for a decade beforehand.) Lily was one of my students this year. She was a very active participant in class and a frequent visitor to office hours, where we discussed an array of substantive legal issues and research topics. She also put in a terrific performance in the very competitive end-of-course examination. I have therefore had the opportunity to get to know her and her work very well.

Lily is an exceptionally strong student, as her remarkable run of top grades indicates and as my own experience confirms. Her mastery of antitrust was genuinely remarkable. Very simply, she was a stand-out student—one of the strongest three or four—in a very competitive classroom full of gifted folks, many of whom had some previous familiarity with the subject matter. In particular, the race for an "A" grade was *exceptionally* competitive: but Lily navigated complex precedent, microeconomic analysis, and tangled facts with remarkable aplomb and accuracy, both in the exam and throughout the course. Her final grade was an appropriate reward for a semester of terrifically impressive work. It was doubly impressive to have accomplished all this while also obtaining a perfect run of A grades in *all* her classes last semester.

In addition, Lily's classroom participation was, without qualification, the best of any student in our very strong class. Her interventions were accurate and concise, showing great understanding of the substance of antitrust doctrine and a strong grasp of antitrust's frontiers and tensions—including their rich practical and philosophical stakes. Moreover, she interacted confidently, respectfully, and effectively with her peers (including those with very different views) and consistently served as a major driver of classroom discussion, frequently spotting and opening up topics and issues in a manner that invited her colleagues to engage. In sum, she was a model participant in our classroom community: enriching the discussions immeasurably, and engaging gladly and perceptively with even the most fiendish problems and puzzles.

Nor was her great participation confined to whole-class discussion. In addition to traditional lecture, our class involved problem-solving work in small groups. During these exercises I consistently observed Lily taking an active but sensitive role with her peers, encouraging others to share their own views and facilitating a great and productive experience for those around her.

Lily's substantive lawyering skills are excellent. As her superb grades, strong academic profile, law-review editorship, and competitive Teaching / Research Assistant positions all suggest—and as my own experience confirms—she is terrific at distilling complex issues down to their components, framing the key arguments effectively and efficiently, and expressing a bottom-line view that is persuasive and nuanced.

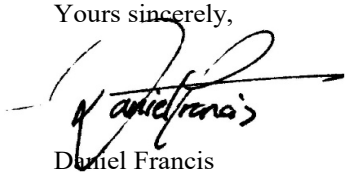
I would gladly trust her to puzzle her way through a complex analytical problem, a messy fact record, or an enigmatic line of authorities. In class, in office hours, and in her final exam, Lily demonstrated a really

strong grasp of the fabric of antitrust doctrine, and showed remarkable confidence and clarity in navigating the often-tangled highways and byways of an antitrust legal analysis.

Finally, I'd like to say a word in acknowledgment and celebration of Lily's practice of citizenship and her orientation toward service. She is a terrifically dedicated member of our community, investing strongly in clinical service, and continuing a rich and distinguished record of service that began long before she came to law school. From her work supporting migrant rights in Mexico to her service helping support first responders in Native American communities, Lily has been contributing where it counts for many years. I have not the least doubt that she will be a superb example of our professional community, and a glowing example for those who follow her.

I hope it's clear that I endorse Lily's application in the strongest possible terms! I wish you the very good fortune of working with her. Needless to say, please don't hesitate to let me know if I can answer any additional questions, or otherwise assist you as you consider Lily's application. It would be my pleasure to do so. You can reach me by phone on 202-538-1775 or by email at *daniel.francis@law.nyu.edu* at any time.

Yours sincerely,



Daniel Francis

New York University
A private university in the public service

Professor Cynthia L. Estlund
Catherine A. Rein Professor of Law

40 Washington Square South
Vanderbilt Hall, Room 403B
New York, NY 10012-1099
Telephone: (212) 998-6184
Facsimile: (212) 995-4590
E-mail: cynthia.estlund@nyu.edu

March 23, 2023

RE: Lily Fagin

Dear Jude:

I am writing to strongly recommend Lily Fagin, NYU School of Law class of 2023, for a clerkship in your chambers. Lily is a very talented young lawyer and legal writer and analyst. It took a semester in law school for Lily to hit her academic stride, but since then she has racked up a stellar set of grades in a wide variety of courses, including one of the top grades in my large Property class last fall.

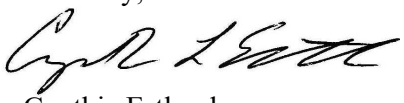
I first got to know Lily in my seminar on Regulating Work Beyond Employment last spring. She was invariably well-prepared and thoughtful in her interventions. Her writing is fluid and clear (which she might owe partly to her two journalist parents!). She showed off her writing skills in several short reaction papers and especially in her final paper, which was one of the very best in the class.

A major theme in the seminar was the clash between antitrust law and collective action among workers classified as independent contractors, and the surprisingly gray outer boundaries of the statutory labor exemption from the Sherman Act. The issue is complicated by the many extant state and federal law tests for the line between "employee" and "independent contractor," and by the legal chronology: The statutory basis for the "statutory labor exemption" from antitrust law predated the 1935 enactment of the NLRA (which covers "employees"); the Supreme Court decision recognizing the exemption came several years after the NLRA; and then the Taft-Hartley amendments that expressly excluded "independent contractors" from the NLRA came several years after that. The Supreme Court has made only a handful of pronouncements on the application of the labor exemption to independent workers, none of which is very illuminating beyond its particular facts.
In her seminar paper, Lily grabbed ahold of a late-breaking First Circuit decision holding that a strike by an association of Puerto Rican jockeys was within the labor exemption whether or not the jockeys were independent contractors. She then applied the court's analysis to the New York City-based "Los Deliveristas," an advocacy group for app-based food delivery workers. Recognizing, however, that the court's analysis (as well as the Supreme Court jurisprudence) was quite underdeveloped, Lily sought to outline a workable and equitable test for the labor exemption that respected the policies underlying both the antitrust laws and

the labor exemption. It is one of the most thoughtful and interesting things I have read in this space.

Lily is also a delightful person—lively, curious, and engaging. She must have been a fabulous teacher (for two years in Brooklyn before law school). She is sure to be a positive presence in any professional setting, including the judicial chambers. All in all, I am confident that you would find Lily to be an excellent law clerk—reliable, energetic, collegial, and professional.

Sincerely,



Cynthia Estlund

NYU | LAW

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March 29, 2023

The Honorable Jamar Walker

Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Lily Fagin

Dear Judge Walker:

It is my pleasure to recommend Lily Fagin for a judicial clerkship. I am a member of the faculty at NYU School of Law and President of the ACLU. Last year, I had the pleasure of working with Lily in the Civil Rights Clinic I teach. Lily is an excellent legal writer, a thorough researcher, and an enthusiastic team member. I am confident she would be an invaluable addition to your chambers.

The Civil Rights Clinic provides students with the opportunity to work on a wide range of civil rights and social justice matters through direct client representation, appellate advocacy, and the development of advocacy campaigns. Selection is highly competitive, and Lily was one of only eight students selected for the Clinic from a pool of over one hundred applicants. From the first class, Lily was a star. Her work was creative, and she demonstrated compassion and profound empathy for her clients and their needs. She has spent time working with community members to fight discriminatory housing, drafted an amicus brief to the United States Supreme Court, and did cutting-edge research and advocacy on a novel reproductive rights issue.

In all of her work, Lily explored different litigation and policy options, conducting extensive legal research into different potential claims and strategizing with litigation partners and other students to determine the best course of action. This process involved not only diligent attention to detail but also creativity and teamwork. Lily was enthusiastic about conducting research to determine which advocacy options were the most promising. With little initial information, Lily and her colleagues in the clinic developed a sophisticated understanding of the economic and political realities on the ground. I was especially impressed by Lily's diligence in developing mastery of the facts. Months later, when drafting advocacy letters and pleadings, Lily deftly incorporated relevant details with the legal framework.

Lily is a talented legal researcher and writer. In her research, she identifies the most important authorities and can succinctly explain how they fit together by adducing underlying principles. One case she worked on involved bringing a false advertising challenge in a novel factual context. Lily quickly developed expertise in the relevant consumer protection law, identifying the most salient barriers to a finding of liability and brainstorming creative ways to distinguish unfavorable precedents.

Lily also co-led the drafting of an amicus brief the clinic filed on behalf of the National Black Law Students' Association in Students for Fair Admissions v. President and Fellows of Harvard College and Students for Fair Admissions v. University of North Carolina. Lily's writing is clear, concise, and always includes appropriate support for her arguments. Because she is also responsible for citations in her role as an Executive Editor of the Review of Law and Social Change, she was always happy to bring her attention to detail and blue-booking skills to the clinic's work.

Lily is a great person to work with not only because of the skills detailed above but also because of her friendly and collaborative approach to her work. Lily developed strong professional and personal relationships with the other students in the clinic. She is a lovely person who cares about her peers and coworkers. She was always thoughtful and respectful of other people's time and generous with her own. She has a good attitude and is open to constructive criticism. I believe she would be a great addition to your team. If I can provide any further information, please let me know.

Sincerely,

Deborah N. Archer

TO: [redacted]
FROM: Lily Fagin, APR Team, NYU Civil Rights Clinic
DATE: November 29, 2021
RE: Federal Court Taxpayer Standing

Question Presented: Do taxpayers have standing to challenge federal and/or state government funds being used to support Crisis Pregnancy Centers in federal court?

Short Answer

Probably yes, but with significant limitations. In general, Article III's "case and controversy" requirement bars individuals whose only injury is by virtue of their status as taxpayers from suing in federal court. *Frothingham v. Mellon (decided with Massachusetts v. Mellon)* 262 U.S. 447 (1923); *see* U.S. Const. art. III § 2, cl. 1. The Supreme Court carved out an exception to this prohibition, however, by granting standing to taxpayers alleging violations of the First Amendment's religion clauses in *Flast v. Cohen*, 392 U.S. 83 (1968). If Crisis Pregnancy Centers (CPCs) receive government funding and are promoting religious beliefs, aggrieved taxpayers could allege violations of the Establishment Clause. This strategy would only apply to religious CPCs who receive Title X, TANF, or state funds. No one has challenged funding for CPCs as violating the Establishment Clause yet.[1]

Long Answer

I. Federal Taxpayer Standing Doctrine

A. General Rule Against Taxpayer Standing

[1] Scholars have discussed the potential for First Amendment violations in the context of judges referring pregnant persons seeking an abortion to consult with CPCs per states' informed consent statutes. *See* Helena Silverstein & Kathryn Lundwall Alessi, *Religious Establishment in Hearings to Waive Parental Consent for Abortion*, 7:2 J. OF CONSTITUTIONAL L. 473 (2004).

In *Frothingham*, *supra*, a taxpayer plaintiff alleged that a federal statute, the Maternity Act of 1921 would, in effect, "take her property, under the guise of taxation, without due process of law." 262 U.S. at 480. The Act appropriated federal money to reduce maternal and infant mortality, but only to those states who chose to participate and accept certain conditions. *See id.* Frothingham was a Massachusetts taxpayer with no personal connection to the issue besides that her tax dollars would be supporting the Act. *See id.* at 486-87. Her challenge was consolidated with that of Massachusetts, which attacked the Act as unduly invasive of its sovereign powers and violative of the Tenth Amendment. *Id.* at 479-80. Until *Frothingham*, the Court had never addressed whether a taxpayer could sue the federal government for an allegedly unconstitutional use of her tax dollars. *See id.* at 486. Earlier decisions had recognized a taxpayer's right to sue a municipality for the same because, in that scenario, their interest is "direct and immediate" given the smaller number of taxpayers affected. *See id.* at 486-87 (citing *Crampton v. Zabriskie*, 101 US 601 (1879)). But the relationship of United States taxpayer to the federal government is "very different":

> His interest in the moneys of the treasury—partly realized from taxation and partly from other sources—is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

Id. at 487. Given the vast number of taxpayers affected by a federal statute and the indeterminacy of their implicated interests, the Court held that "[t]he administration of any statute….is essentially a matter of public and not individual concern." *Id.* The Court cautioned that a

contrary holding would lead to down slippery slope whereby any individual taxpayer could attack any action of the federal government. *Id.*

The *Frothingham* Court largely based its holding on separation of powers concerns. *See id.* 487-89. Sustaining a taxpayer suit would invade the province of Congress because it would allow the Court to adjudge the constitutionality of a statute in the absence of a "direct injury suffered or threatened." *Id.* at 488. When a particular injury is alleged, the Court says what the law is to determine how the law applies to the controversy before it. *Id.* This limitation prevents the Court from undermining Congress's power to make laws. *See id.* Hence a party seeking to invoke the power of the courts "must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.* The Court held that Frothingham had made no such showing, so she lacked standing to sue. *Id.* Allowing her case to proceed to the merits "would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess." *Id.* at 489.

Crucially, the court noted that a resident could sue to enjoin a *local* government's illegal use of tax dollars because "[t]he interest of a taxpayer of a municipality in the application of its moneys is direct and immediate," analogous to that of a shareholder's interest in a private corporation. Even so, the court rejected a First Amendment challenge by New Jersey taxpayers to a state law which authorized public school teachers to read from the Bible because that statute did not clearly involve the expenditure of funds. *Doremus v. Board of Ed. of Hawthorne*, 342 U.S. 429, 433-35 (1952). After *Frothingham*, then, federal taxpayer suits were barred, and state or local taxpayer suits were limited to those challenging expenditures of funds.

B. The *Flast* Exception

In *Flast*, *supra,* seven federal taxpayers sued to prevent federal funds from being used to finance instruction at and purchase textbooks for religious schools, alleging that such use of funds violated the First Amendment. 392 U.S. at 85-87. Titles I and II of the Elementary and Secondary Education Act of 1965 required local governments applying for federal funding to submit proposals where special educational opportunities and instructional materials would be "provided on an equitable basis for the use of children and teachers in private elementary and secondary schools," including private religious schools. *See id.* at 87. Because funds would only be disbursed to localities that adhered to the statutory requirement to fund private religious schools as well, the *Flast* plaintiffs argued, the challenged provisions of the Act "constitute a law respecting an establishment of religion" and "prohibit the free exercise of religion." *Id.* at 87. Because the plaintiffs' only alleged injury was that their tax dollars were being used in contravention of the First Amendment, *Flast* required the Court to revisit the issue of whether taxpayers had standing to challenge actions of the federal government. *See id.* at 85, 89. A divided three-judge panel held that *Frothingham* barred the taxpayers' suit. *Id.* at 88.

The Court reversed, holding that the *Flast* plaintiffs did have standing. *See id.* at 88. Writing for the majority, Chief Justice Warren rejected the government's argument that, per *Frothingham*, the requirements of Article III represent an "absolute bar" to taxpayer suits. *See id.* at 92-94, 100-01. The Court characterized *Frothingham*'s holding (and justiciability doctrine more broadly) as resting on both prudential and Constitutional considerations. *See id.* at 92-101. The Court then argued that constitutional separation of powers issues do not arise by virtue of the threshold inquiry into whether someone is a proper party to sue, but rather depending on the substance of that person's claim. *Id.* at 100-101. Thus, "the question of standing is related only to

whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Id.* at 101. This depends on the interest of the party invoking federal court jurisdiction in the outcome of the case. *Id.*

The Court then articulated a test to determine when individuals have "the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements." *Id.* at 102. The test has two prongs. *Id.* "First, the taxpayer must establish a logical link between that status [as a taxpayer] and the type of legislative enactment attacked." *Id.* (emphasis added). Only a challenge to an exercise of Congress' power under the Taxing and Spending Clause, as opposed to an "incidental expenditure of tax funds in the administration of an essentially regulatory statute," can confer standing. *Id.*; *see* U.S. Const. art. I § 8. "Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." *Flast*, 392 U.S. at 102 (emphasis added). In other words, the taxpayer must argue that the challenged government action "exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress." *Id.* at 102-03.

The Court held that the *Flast* plaintiffs' challenge satisfied both nexuses. *Id.* at 103. Plaintiffs sought to enjoin expenditure of federal tax dollars pursuant to of Congress's Article I § 8 power to tax and spend for the "general welfare," satisfying the first nexus. *Id.*; *see* U.S. Const. art. I § 8. And plaintiffs were able to point to the religion clauses of the First Amendment as specific constitutional limitations on the exercise of the taxing and spending power. *Id.*; *see* U.S. Const. amend. I. Citing the contemporaneous writings of James Madison, "generally recognized as the leading architect of the religion clauses of the First Amendment," the Court argued that the

founders intended for the First Amendment's Establishment and Free Exercise clauses to serve as a limitation on the government's taxing and spending powers. *See Flast,* 392 U.S. at 103-04.[2]

The Court left open the possibility that other specific constitutional limitations on the exercise of the taxing and spending power besides the Establishment Clause exist. *Id.* at 105. "[W]henever such specific limitations are found, we believe a taxpayer will have a clear stake as a taxpayer in assuring that they are not breached by Congress." *Id.* at 106. Thus, *Flast's* holding was not limited to Establishment Clause-based challenges:

> [A] taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power.

Id. at 105-06. Such a case would be sufficiently specific and adversarial to warrant judicial resolution. *See id.* at 106.

C. SCOTUS Treatment of More Recent Taxpayer Challenges

After *Flast*, the Court granted standing to plaintiffs bringing Establishment Clause-based challenges to statutes under which federal dollars were supporting organizations that engaged in religious activity. In *Tilton v. Richardson*, for example, the Court granted taxpayers standing to object to the provision of federal construction grants for private colleges and universities under the Higher Education Facilities Act of 1963. 403 U.S. 672 (1971). While the Act specified that

[2] In *Frothingham*, by contrast, the plaintiff had not satisfied the second nexus. *See Flast*, 392 U.S. at 105. Frothingham had alleged that the Maternity Act violated her due process rights, but the Fifth Amendment Due Process Clause does not necessarily protect taxpayers from increased liability. *Id*. Frothingham had also attacked the Maternity Act as exceeding Congress's taxing and spending power and violating the Tenth Amendment by invading the province of the states. *See id*. But in doing so, she was actually "attempting to assert the States' [specifically Massachusetts's] interest in their legislative prerogatives and not a federal taxpayer's interest in being free of taxing and spending in contravention of specific constitutional limitations imposed upon Congress' taxing and spending power." *Id*. By holding that Frothingham would have failed the second prong of the *Flast* test for taxpayer standing, the Court was able to reconcile its decision in *Flast* with the precedent established by *Frothingham*. *See id*.

grant money should not go to "any facility used or to be used for sectarian instruction or as a place for religious worship, or * * * primarily in connection with any part of the program of a school or department of divinity," the government's interest in ensuring the institutions' secular character would only last 20 years. *Id.* at 672. Because the government had not demanded adequate assurance that these colleges would pay back their grant money if they began using the facilities for religious purposes, plaintiffs had demonstrated a constitutional violation. *See id.* at 683. While the *Tilton* Court never explicitly addressed the question of whether the taxpayers had standing, it ruled on the merits of their challenge, suggesting their suit fell within the *Flast* exception. *See id.; see also Tilton v. Richardson*, 399 U.S. 904 (1970) (noting probable jurisdiction).

A decade later, the Court rejected a taxpayer challenge to the Federal government's conveyance of a former army hospital to a Christian collage free of cost. *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). Writing for the majority, Rehnquist argued that *Flast* was not satisfied because plaintiffs were challenging a decision by an administrative agency pursuant to the Federal Property and Administrative Services Act of 1949, an exercise of Congress's Property Clause power rather than its Taxing and Spending Clause power. *See id.* at 479-80. Rehnquist held that the plaintiffs had failed "to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. Yet the taxpayer plaintiffs in *Tilton* had not claimed a more particularized injury either. *See id.* at 512 (Brennan, J., dissenting).

Taken together, *Tilton* and *Valley Forge* suggest that the *Flast* exception only enables taxpayers to challenge government action pursuant to Congress's exercise of its taxing and

spending power. *Compare Tilton*, 403 U.S. 672 (granting standing to taxpayers challenging a government program of funding construction by private colleges, including religious ones) *with Valley Forge Christian Coll.,* 454 U.S. at 482 (denying standing to taxpayers challenging the government's decision to convey surplus property to a religious college free of cost). While the government action in both cases benefitted religious institutions, the plaintiffs in *Valley Forge* could not draw a close enough connection between their tax dollars and the government's action to satisfy the first nexus of *Flast. Valley Forge Christian Coll.,* 454 U.S. at 479-80.

Bowen v. Kendrick reaffirmed that, where plaintiffs challenged an exercise of the Taxing and Spending power as violating the Establishment Clause, they could be granted standing under *Flast.* 487 U.S. 589 (1988). Even though the plaintiffs were unsuccessful in convincing the court that the Adolescent Family Life Act (AFLA) violated the Establishment Clause on its face, the Court held that their status as taxpayers was sufficient to confer standing. *Id.* at 591, 618-19. The Court rejected the government's contention that because the Secretary of Health and Human Services was involved in administering the AFLA, it was not really an exercise of Congress's taxing and spending powers. *Id.* at 619-20. Rather, because "the AFLA is at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers, and appellees' claims call into question how the funds authorized by Congress are being disbursed pursuant to the AFLA's statutory mandate," there was "a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power." *Id.* The Court remanded the case to the District Court to assess the merits of plaintiff's as applied challenge. *Id* at 620.

In more recent Establishment Clause taxpayer suits, the Court has held that plaintiffs lack standing—again because they were not challenging exercises of Congress's taxing and spending power. *See, e.g. Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), *Arizona*

Christian School Tuition Org. v. Winn, 563 US 125, (2011)[3]. *See also Laskowski v Spellings*, 546 F3d 822 (7th Cir. 2008) (observing that after *Hein*, "the reach of *Flast* is now strictly confined to the *result* in *Flast.* And the result in *Flast* was that the taxpayers had standing to seek an injunction to halt a specific congressional appropriation alleged to violate the Establishment Clause.")While recent decisions have been unfavorable to plaintiffs suing on an aggrieved taxpayer theory, the core holdings of *Flast* remain intact. Where plaintiffs can connect their status as taxpayers to an exercise of Congress's taxing and spending power and a specific constitutional harm (in practice, only a violation of the First Amendment's Establishment Clause), they have standing to sue in an Article III court. *See Flast*, 392 U.S. at 102.

II. Alleging that government funding for CPCs violates the Establishment Clause

A. Federal Taxpayer Standing: Title X Funding for CPCs

Some CPCs in California, New Mexico, and Washington receive federal funding via Title X.[4] *See* 42 U.S.C. § 300 et seq. (project grants and contracts for family planning services). If

[3] In *Hein v. Freedom From Religion Foundation, Inc.*, the Court denied standing to taxpayers claiming that conferences held by President Bush as part of his Faith-Based and Community Initiatives program violated the Establishment Clause. 551 U.S. at 592-93. Alito, writing for the majority, argued that because spending on these conferences "resulted from executive discretion, not congressional action," the taxpayer plaintiffs were not within the *Flast* exception. *Id.* at 605. While tax dollars were supporting the Executive Branch program, plaintiffs had not directed their challenge against a particular statute. *Id.* at 607. In dissent, Souter rejected this distinction between legislative and executive actions because the injury to taxpayers—state endorsement of religion in violation of the First Amendment—was the same. *Id.* at 637 (Souter, J., dissenting). If plaintiffs had identified and challenged the specific statute under which funds were appropriated for this Executive Branch program rather than the program itself, the Court seemingly would have granted them standing. *See id.* at 607. In *Arizona Christian School Tuition Org. v. Winn*, the Court applied the same formalistic logic to deny standing to Arizona taxpayers challenging their state's provision of tax credits for contributions to charitable organizations that provide scholarships to students attending private schools, many of which are religious. 563 US at 129, 137-38. Writing for the majority, Kennedy held that plaintiffs had failed to allege an injury sufficient to confer standing; there was insufficient evidence that Arizona taxpayers suffered economic harm. *Id.* at 137-38. Because the funding supporting students' tuition at private religious schools was not directly drawn from tax revenue and the plaintiffs did not demonstrate that Arizona's policy of providing credits increased their tax burden, this challenge failed the first prong of *Flast*. *Id.* at 137-38, 144.

[4] THE ALLIANCE: STATE ADVOCATES FOR WOMEN'S RIGHTS AND GENDER EQUALITY, STUDY OF CRISIS PREGNANCY CENTERS (CPCS) IN NINE STATES: ALASKA, CALIFORNIA, IDAHO, MINNESOTA, MONTANA, NEW MEXICO, OREGON, PENNSYLVANIA, WASHINGTON (2021) (hereinafter "Alliance Report")

CPCs are infusing religion into their operations, taxpayers could have standing to challenge CPCs' receipt of Title X funds. Because most CPCs are grounded in religious ideology, there is a strong possibility that their programs use federal funding to promote that ideology.[5]

As a program of grants, Title X is an exercise of Congress's taxing and spending power analogous to the statutes at issue in *Tilton* or *Bowen*. 42 U.S.C. § 300 et seq.; *see Tilton,* 403 U.S. 672; *Bowen*, 487 U.S. 589; *see also* U.S. Const. art. I § 8. Thus, the first prong of *Flast*, a connection between the plaintiff's status as a taxpayer and the type of "legislative enactment attacked," is satisfied. *See Flast,* 392 U.S. at 102. The second prong of *Flast* is likely also satisfied because Supreme Court precedent firmly establishes the First Amendment's religion clauses as "specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." *Id.* at 102-03*; see, e.g., Tilton,* 403 U.S. 672; *Bowen*, 487 U.S. 589.

Whether an aggrieved taxpayer suit could in fact enjoin CPCs from receiving Title X funding depends on the merits of the claimed Establishment Clause violation. To assess whether a statute violates the Establishment Clause, courts ask whether: (1) the statute has "a secular legislative purpose," (2) "[the statute's] principal or primary effect…neither advances nor inhibits religion…" and (3) "the statute foster[s] an excessive government entanglement with religion." *Lemon v Kurtzman*, 403 U.S. 602, 612-13 (1971) (internal citations omitted). Because Title X is primarily a program of family planning grants for low-income families, it would easily satisfy *Lemon*'s first two criteria. *See id; see also* 42 U.S.C. § 300 et seq. Whether disbursing Title X funding to CPCs fosters "an excessive government entanglement with religion" would be

[5] For example, Obria, a CPC network affiliated with Catholic beliefs, receives Title X funding. CAMAPIGN FOR ACCOUNTABILITY, TROLLING FOR TITLE X FUNDS: HOW BUSINESSWOMAN KATHLEEN EATON BRAVO DIVERTED FEDERAL FUNDS DESIGNATED FOR FAMILY PLANNING SERVICES TO HER EMPIRE OF DELIBERATELY MISLEADING CLINICS (2019), https://campaignforaccountability.org/wp-content/uploads/2019/05/CfA-Report-Obria-History-5-13-19.pdf.

a fact-intensive inquiry depending on how much CPCs are engaging in religious activity. *See Lemon*, 403 U.S. at 613.

B. State Taxpayer Standing: State Funding for CPCs

State taxpayers can also challenge unconstitutional state spending. *Doremus*, *supra*, held that state taxpayer plaintiffs only had standing to bring a "good-faith pocketbook action," meaning plaintiffs were required to trace the specific economic harm they suffered because of a state's allegedly unconstitutional act. *See* 342 U.S. at 434 (citing *Frothingham*, 262 U.S. at 488); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345 (2006) ("The…rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers."). It is, however, unclear whether the *Flast* exception applies any differently to *state* taxpayer challenges compared to *federal* ones, largely because most recent caselaw reverses grants of standing to taxpayer plaintiffs. *See, e.g., Arizona Christian School Tuition Org.*, *supra*, *Ansley v. Warren*, 861 F.3d. 512 (4th Cir. 2017) (reversing the District Court's holding that North Carolina taxpayers had standing to challenging a state statute allowing public officials to recuse themselves from performing same-sex marriages), *Barber v. Bryant*, 860 F3d 345 (5th Cir. 2017) (reversing the District Court's holding that Mississippi taxpayers had standing to challenge a state statute barring discrimination against people who act in accordance with anti-LGBTQ religious beliefs). The Supreme Court distinguished *DaimlerChrysler Corp* from Flast, however, because *DaimlerChrysler* did not allege an Establishment Claus violation. *See id.* at 349. In *Arizona Christian School Tuition Org*, the problem was not that the taxpayers challenged state rather than federal action, but instead that the nexus requirements of *Flast* were not met (in other words, that the plaintiffs could not connect their status as taxpayers to the state's action). *See* 563 U.S. at 138-145 (citing taxpayer cases challenging federal spending as precedent and denying

standing because the first nexus required by *Flast* was not met). Thus, while it is an open question whether the *Flast* analysis changes for state as opposed to federal taxpayer challenges, there is no reason to think that attacking state spending presents an additional barrier.[6]

Several states provide funding for CPCs, including Pennsylvania and Minnesota.[7] Taxpayers in those states could similarly allege Establishment Clause violations sufficient to confer Article III standing. *See supra* Part II-A. The Establishment Clause is binding on the states through the Fourteenth Amendment. *Everson v Bd. of Ed. of Ewing Twp*., 330 US 1, 8 (1947); *Murdock v. Pennsylvania*, 319 US 105, 108 (1943). Again, the success of Establishment Clause-based claims on the merits would depend on plaintiffs' ability to demonstrate that CPC activity promotes an "excessive government entanglement with religion." *Lemon*, 403 U.S. at 613.

1. Pennsylvania

Pennsylvania contracts with Real Alternatives, a CPC network, to administer its Pregnancy and Parenting Support Services (formerly Alternatives to Abortion) program.[8] Pennsylvania's Department of Human Services (DHS) funds Real Alternatives through a combination of federal Temporary Assistance for Needy Families (TANF) monies and State

[6] In a decision about the merits of an Establishment Clause challenge, the Supreme Court affirmed lower courts' determination that state taxpayer plaintiffs had standing. *School Dist. of City of Grand Rapids v. Ball,* 473 U.S. 373, 380 n. 5 (1985). *See also Pedreira v Kentucky Baptist Homes for Children, Inc*., 579 F.3d 722, 733 (6th Cir. 2009) (granting standing to state taxpayer plaintiffs challenging a state-funded religious foster care organization's practice of denying employment to LGBTQ individuals as violating the Establishment Clause). *But see Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017) (denying standing to state taxpayers invoking *Flast* exception); *Ansley v. Warren*, 861 F.3d. 512 (4th Cir. 2017) (same).

[7] Alliance Report, *supra* note 4.

[8] Letter from Division of Procurement, Pennsylvania Department of Health, to Real Alternatives (June 24, 2019), https://www.documentcloud.org/documents/6939360-RA-PA-19-20-Extension-Searchable.html (obtained by Campaign for Accountability and published via Document Cloud).

General Fund monies according to a grant agreement.[9] Funds are currently appropriated for Real Alternatives as part of Pennsylvania's annual budget. *See* 72 PA. STAT. ANN. § 1729-B(5).

Based on a search of Lexis, West, and Google, there is no specific state statute establishing nor implementing the Pregnancy and Parenting Support Services/Alternatives to Abortion program. Instead, the program is part of Pennsylvania's State Plan for its TANF block grant.[10] The renewal of the program each year thus appears to be a matter committed to the Pennsylvania DHS's discretion. *Cf. Hein*, 551 U.S. at 605 (use of taxpayer dollars for President Bush's Faith-Based and Community Initiatives program was a matter of executive discretion). Given *Valley Forge* and *Hein*'s emphasis on attacking a specific legislative enactment as a prerequisite for claiming taxpayer standing under the *Flast* exception, it could be difficult to challenge Pennsylvania's funding of Real Alternatives on an aggrieved taxpayer theory in Federal Court. *See Valley Forge*, 454 U.S. at 479; *Hein*, 551 U.S. at 605. It is possible to argue that the distinction between executive and legislative actors in the implementation of an unconstitutional law is artificial, given that executive branch actors ultimately derive their discretionary authority from an authorizing statute. *See Hein*, 551 U.S. at 637 (Souter, J., dissenting). Considering that the trend in Supreme Court doctrine has been towards narrowing *Flast*, this argument is unlikely to succeed. *See Arizona Christian School Tuition Org*, 861 F.3d. 512.

2. Minnesota

Minnesota sponsors a Positive Alternatives program like Pennsylvania's, providing grants to nonprofits "promoting healthy pregnancy outcomes [i.e., not abortion] and assisting

[9] *Id.*
[10] PA. DEP'T OF HUM. SERVS., 2021 TANF STATE PLAN 35-36 (effective October 2021), https://www.dhs.pa.gov/Services/Assistance/Documents/TANF%20State%20Plan%20effective%20date%20October%201_%202021%20Clean%20080421.pdf.

pregnant and parenting women in developing and maintaining family stability and self-sufficiency."[11] Grantee organizations include several CPCs, with a total of $2,808,891 going to CPCs in 2021.[12] Some grantee organizations are explicitly religious: Catholic Charities of the Diocese Winona-Rochester, for example, receives $248,541 annually under the Positive Alternatives program.[13] While none of the other grantees have explicitly religious names, many are likely also motivated by religious ideology or affiliated with religious groups.[14]

Unlike Pennsylvania's program, Minnesota's Positive Alternatives program is specifically authorized by statute. MINN. STAT. § 145.4235 (2021). The statutory criteria for grant recipients make no mention of a need to refrain from religious activity. *See id.* §§ 2(c). The Commissioner of Minnesota's Department of Health is responsible for overseeing the program and can cease funding to grantees that fall out of compliance with the statute. *See id.* §§. 4. Even though the Commissioner has discretion in administering the statute, her authority is grounded in a legislative mandate. *See id.* Thus, an aggrieved taxpayer challenge to Minnesota's statute would be analogous to *Bowen v. Kendrick*, where the Court granted taxpayer standing and rejected the government's argument that an Executive Branch member's role in administering a statute brought the case outside the ambit of *Flast*. *See* 487 U.S. at 619-20. The statute establishing Minnesota's Positive Alternatives program is primarily concerned with appropriating funds. *See* MINN. STAT. § 145.4235 (2021). Hence the statute is best understood as

[11] *Positive Alternatives Overview*, MINN. DEP'T OF HEALTH, (October 10, 2022), https://www.health.state.mn.us/people/womeninfants/positivealt/overview.html.
[12] San Stroozas, *Every Fake Abortion Clinic in Minnesota, Mapped*, RACKET (August 26, 2021), https://racketmn.com/every-fake-abortion-clinic-in-minnesota-mapped/ (referring to CPCs as "fake clinics").
[13] MINN. DEP'T OF HEALTH, 2021 - 2025 POSITIVE ALTERNATIVES GRANT AWARDS WITH PROGRAMS OR SERVICES, (2021), https://www.health.state.mn.us/docs/people/womeninfants/positivealt/paagrantees202125.pdf.
[14] *See* Nancy Gibbs, *The Grassroots Abortion War*, TIME (Feb. 15, 2007), https://web.archive.org/web/20070218124958/http://www.time.com/time/printout/0,8816,1590444,00.html.

an exercise of the state's taxing and spending power, satisfying the first nexus from *Flast*. *See Flast*, 392 U.S. at 102.

The second nexus requires the taxpayer to connect their status as a taxpayer to "the precise nature of the constitutional infringement alleged." *Id.* The Court's jurisprudence since *Flast* firmly establishes that the First Amendment's religion clauses serve as a limitation on government taxing and spending powers, and violation of them is a constitutional injury sufficient to confer standing on any affected taxpayer. *See Flast*, 392 U.S. at 102; *see also supra,* Section I-C-1. If Minnesota's Positive Alternatives funding is being used to support CPCs who also engage in religious activity, a taxpayer could have standing to challenge MINN. STAT. § 145.4235 (2021). The taxpayer's injury is arguably even more particularized than in *Flast* because the pool of taxpayers in Minnesota is considerably smaller than the pool of all federal taxpayers. *See Frothingham*, 262 U.S. at 487; *Flast* 392 U.S. at 106.

There is a jurisdictional problem with attempting to challenge this law in Federal Court, however: the statute states that the Minnesota Supreme Court has original jurisdiction over an action challenging its constitutionality. MINN. STAT. § 145.4235 Subd. 6 (2021).

III. Consequences of invoking the *Flast* exception before the current Supreme Court

Regardless of the legal precedent supporting an Establishment Clause-based taxpayer challenge to funding for CPCs, the likelihood of success before the current Supreme Court is extremely low. In *Hein*, Justice Scalia, joined by Justice Thomas, advocated for overruling *Flast* and eliminating its exception to the rule against taxpayer standing altogether. *See Hein*, 551 U.S. at 618 (Scalia, J., dissenting). Scalia characterized the harm suffered by the plaintiffs in *Flast* and its progeny as a "psychic injury" rather than a "wallet injury." *See id.* 619-30. Scalia and Thomas again advocated for overturning *Flast* in a concurring opinion in *Arizona Christian School*

Tuition Org., 563 U.S. at 147 (Scalia, J., concurring).[15] The fact that Scalia wrote separately suggests that Kennedy's controlling opinion in *Arizona Christian School Tuition Org.* leaves the core holdings of *Flast* intact.[16] But given changes in the composition of the Supreme Court since 2011, it is possible that the Court would dispose of an aggrieved taxpayer suit by overruling *Flast.* But it may be equally likely the Court would continue the trend of *Hein* and *Arizona Christian School Tuition Org.* by finding some way to distinguish *Flast*, narrowing its holding further without overruling it outright. *See supra* § I-C-1.

IV. Conclusion

While there is a solid legal argument that federal or Minnesota taxpayer plaintiffs could challenge government funding for CPCs as violating the Establishment Clause, this strategy would require intensive fact investigation into CPCs' everyday practices and would only affect a small proportion of all CPCs nationwide. Especially given the Supreme Court's growing hostility to taxpayer standing, it is probably not worth pursuing an aggrieved taxpayer strategy in federal court at this time.

[15] Even the majority opinion in *Arizona Christian School Tuition Org.* significantly narrowed the *Flast* exception, distinguishing the Arizona program from *Flast* because the state was providing tax credits as a subsidy rather than taxing directly. 563 U.S. at 142. In dissent, Kagan complained that the majority opinion "enables the government to end-run Flast's guarantee of access to the Judiciary. From now on, the government need follow just one simple rule—subsidize through the tax system—to preclude taxpayer challenges to state funding of religion." *Id.* at 148 (Kagan, J., dissenting).

[16] *See* Lyle Denniston, *Opinion Recap: The Near-end of "Taxpayer Standing,"* SCOTUSBLOG (Apr. 4, 2011, 11:26 AM), https://www.scotusblog.com/2011/04/opinion-recap-the-near-end-of-taxpayer-standing/.

Applicant Details

First Name	**Ja'Brae**
Middle Initial	**C**
Last Name	**Faulk**
Citizenship Status	**U. S. Citizen**
Email Address	**f.jabrae@wustl.edu**
Address	**Address** Street **5522 Delmar blvd** City **St. Louis** State/Territory **Missouri** Zip **63112** Country **United States**
Contact Phone Number	**9106035510**

Applicant Education

BA/BS From	**North Carolina A&T State University**
Date of BA/BS	**May 2020**
JD/LLB From	**Washington University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014**
Date of JD/LLB	**May 10, 2024**
Class Rank	**I am not ranked**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Davis, Adrienne
adriennedavis@wustl.edu
Fulton, Neil
neil.fulton@usd.edu
605-658-3500
Brazeal, Gregory
gregory.brazeal@usd.edu
605-658-3509
Kippley, Amanda
amanda_kippley@fd.org

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ja'Brae Faulk
5522 Delmar Blvd.
St Louis, MO 63112
Apt 704
910-603-5510
F.jabrae@wustl.edu

Date

The Honorable [Name]
[Name of Court]
Street Address
City, State ZIP

Dear [Chief] Judge [Name]:

I am writing to apply for a clerkship in your chambers, either beginning in 2024 or for your next available position. I am currently a third-year law student at the Washington University School of Law, where I serve as a Research/Teaching Assistant to the renowned scholar, Professor Adrienne Davis, and where I will serve as an instructor of an undergraduate course this upcoming fall. My family relocated to Hampton, Virginia years ago, and I have since spent much time in the "Hampton Roads" area. I welcome the opportunity to begin my career in Virginia.

Enclosed please find my résumé, transcripts, and two writing samples. The first writing sample is a Judicial Order on behalf of the Honorable Staci Yandle I completed during my externship in her chambers. The second writing sample is an essay/article submission I completed for Education Law. The following individuals are submitting letters of recommendation separately and welcome inquiries in the meantime.

Professor Adrienne Davis Washington University School of Law Adriennedavis@wustl.edu 314-935-8583	Dean Neil Fulton University of South Dakota Knudson School of Law Neil.Fulton@usd.edu 605-658-3500	Professor Gregory Brazeal University of South Dakota Knudson School of Law Gregory.Brazeal@usd.edu 605-658-3500	Mrs. Amanda Kippley Federal Public Defenders Amanda_Kippley@fd.org 605-330-4489

I would welcome any opportunity to interview with you. Thank you for your time and consideration.

Sincerely,

Ja'Brae Faulk

JA'BRAE FAULK

(910) 603-5510 | f.jabrae@wustl.edu | 5522 Delmar Blvd. 704, St. Louis, MO, 63112

EDUCATION

Washington University School of Law — St. Louis, MO
J.D. Candidate | GPA 3.10 — May 2024
Honors & Activities: Scholars in Law Award
Faculty Scholarship Workshop
Black Law Students Association

North Carolina A&T State University — Greensboro, NC
B.A. in Liberal Arts — May 2020
Honors & Activities: Honor Society
Dean's List (2018-2020)
Student Government Association
National Black Law Students Association (Pre Law)

EXPERIENCE

Washington University School of Law — St. Louis, MO
Instructor, Law, Gender and Justice — Fall 2023
- Co-teach a three-credit course in Department of Women, Gender, & Sexuality structured for pre-law students

Teaching Assistant for Professor Adrienne Davis, Critical Race Theory, Trust & Estates — Fall 2023
- Assist Professor Davis in instructing two doctrinal courses
- Host review sessions for LLM students

Research Assistant to Professor Adrienne Davis — August 2022 - Present
- Assist Professor Davis in producing scholarship on topics including gender/race relations, theories of justice, and law and popular culture
- Redeveloped Washington University's Race & the Law course

U.S. District Court, Southern District of Illinois — East St. Louis, IL
Judicial Extern to the Honorable Judge Staci Yandle — June 2022-August 2022
- Drafted legal memoranda and conducted legal research on issues including compassionate release, habeas petitions, the Lanham Act, and summary judgement motions for the use of the court
- Observed hearings, trials and other court proceedings

Federal Public Defender's Office of North Dakota and South Dakota — Sioux Falls, SD
Judiciary Procurement Program — January 2022-May 2022
- Assisted in various hearings, trials, and over 30 initial appearances representing indigent criminal defendants
- Interviewed witnesses and family members, worked with clients, and drafted and edited motions for the United States District Court and the United States Court of Appeals (Eighth Circuit)

Great North Innocence Project — Minneapolis, MN
Intern — August 2021-May 2022
- Completed 180 pro bono hours working on exonerations of convicted individuals
- Litigated cases where newly discovered evidence could provide clear and convincing proof of innocence

Robeson County Superior Court — Lumberton, NC
Judicial Extern to the Honorable Judge Tiffany Peguise-Powers — May 2021-August 2021
- Drafted legal memoranda and conducted legal research on issues including burdens of proof for appeals from the District Court to the Superior Court in Robeson County and North Carolina sentencing guidelines
- Drafted court orders for the Judge's review

LANGUAGES/INTERESTS

Languages: Spanish (Proficient); Interests: anime, film, and piano

Faulk, Ja'Brae Coran
203 Greenwell Dr
Hampton VA 23666-1732

Student Attended/Attending
the Following Regental Universities:
The University of South Dakota, Vermillion, SD

SEND TO : f.jabrae@wustl.edu

COURSE	COURSE TITLE	CRD	GRD	RPT
Beginning Fall 2003, credit earned from all six SD Regental Universities will be identified and displayed under the term header				
2020 Fall	**Institutional Credit - SD Board of Regents Universities**			
U LAW 701	TORTS	4.00	75	
U LAW 702	CONTRACTS I	2.00	68	
U LAW 704	CRIMINAL LAW	3.00	71	
U LAW 706	CIVIL PROCEDURE I	3.00	63	
U LAW 707	FUNDAMENTAL LEGAL SKILLS I	3.00	68	
U LAW 708	LEGAL RESEARCH FOUNDATIONS	1.00	93	
TERM ATT: 16.00 CMPL: 16.00 GPA: 70.938				
2021 Spring	**Institutional Credit - SD Board of Regents Universities**			
U LAW 703	PROPERTY	4.00	70	
U LAW 752	CONTRACTS II	3.00	78	
U LAW 754	CRIMINAL PROCEDURE	3.00	80	
U LAW 756	CIVIL PROCEDURE II	3.00	76	
U LAW 757	FUNDAMENTAL LEGAL SKILLS II	2.00	69	
U LAW 709	FOUNDATIONS OF LAW	1.00	94	
TERM ATT: 16.00 CMPL: 16.00 GPA: 75.875				
2021 Fall	**Institutional Credit - SD Board of Regents Universities**			
U LAW 810	CONSTITUTIONAL LAW	4.00	72	
U LAW 823	EVIDENCE	3.00	71	
U LAW 831	ADVANCED APPELLATE ADVOCACY	2.00	89	
U LAW 859	ANTITRUST LAW/CONS PROTECTION	3.00	88	
U LAW 860	INTELLECTUAL PROPERTY	2.00	65	
U LAW 895	PRACTICUM: INNOCENCE PROJECT	2.00	N	
TERM ATT: 16.00 CMPL: 16.00 GPA: 76.643				

COURSE	COURSE TITLE	CRD	GRD	RPT
2022 Spring	**Institutional Credit - SD Board of Regents Universities**			
U LAW 833	SALES AND LEASES	3.00	87	
U LAW 857	PROFESSIONAL RESPONSBILITY	3.00	67	
U LAW 876	FIRST AMENDMENT RIGHTS	3.00	76	
U LAW 892	TOP: DATA PROTECTION & PRIVACY	1.00	N	
U LAW 892	TOPICS: CYBER LAW	3.00	87	
U LAW 895	PRACTICUM: INNOCENCE PROJECT	2.00	N	
TERM ATT: 15.00 CMPL: 15.00 GPA: 79.250				

	ATT HRS	CMPL HRS	GPA HRS	GRADE PTS	GPA
TRANSFER	0.00	0.00	0.00	0.00	0.000
INSTI USD	63.00	63.00	58.00	4373.00	75.397
CUM	63.00	63.00	58.00	4373.00	75.397

********** END OF TRANSCRIPT **********

6/12/23, 10:22 AM

Washington University Unofficial Transcript for: **Ja'Brae Faulk**
Student ID Number: 515580 [Printer Friendly]
Student Record data as of: 6/12/2023 9:21:34 AM [How to: Save as PDF]

HOLDS - no records of this type found

DEGREES AWARDED - no records of this type found

MAJOR PROGRAMS

---------Semester--------- Admitted	Terminated	Status	Code	Prime or Joint	Program
FL2022		Open	LW0160	Prime	JURIS DOCTOR

ADVISORS - no records of this type found

SEMESTER COURSEWORK AND ACADEMIC ACTION

Note: Courses dropped with a status of 'D' will not appear on your transcript.
Courses dropped with a status of 'W' will appear on your transcript.

FL2022

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
W74 LAW	528H	01	3.0	C		2.98				Media Law (Hoppenjans)
W74 LAW	535J	01	3.0	C		3.46				Comparative Law (Garlicki)
W74 LAW	578K	02	1.0	P		CR				Negotiation (Tokarz)
W74 LAW	604D	01	3.0	C		2.92				Adoption and Assisted Reproduction (Appleton)
W74 LAW	608F	01	3.0	C		3.16				Race & the Law (Davis)
W74 LAW	636A	01	3.0	C		3.04				Information Privacy Law (Richards)

Enrolled Units: 16.0 **Semester GPA:** 3.11 **Cumulative Units:** 46.0 **Cumulative GPA:** 3.11

MSN 8010 NOTE:, Transfer In (Univ of South Dakota): Torts, Contracts I/II, Criminal Law, Civil Procedure I/II, Property, Constitutional Law, Fundamental Legal Skills I/II **Transcript:** No **Expires** 12/31/2999

SP2023

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
W74 LAW	538A	02	3.0	C		3.04				Corporations (Tuch)
W74 LAW	609T	01	3.0	C		2.92				The Law of the Fourteenth Amendment (Crum)
W74 LAW	642D	01	2.0	C		3.04				Corporate and White Collar Crime (Albus/Goldsmith/Harlan)
W74 LAW	643C	01	3.0	C		2.98				Copyright & Related Rights (Collins)
W74 LAW	718E	01	3.0	C		3.28				Education Equality, Equity and Fairness: K-12 (Norwood/St. Omer)
W74 LAW	718G	01	1.0	C		3.52				Higher Education Law (Steele)

Enrolled Units: 15.0 **Semester GPA:** 3.08 **Cumulative Units:** 61.0 **Cumulative GPA:** 3.10

FL2023

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
W74 LAW	562C	01	2.0	C						Ethics and Professionalism in the Practice of Law (Pratzel)
W74 LAW	600T	82	1.0	P						Teaching Assistant
W74 LAW	802C	01	3.0	P						Supervised Instruction: Law, Gender and Justice
W76 LAW	832S	01	3.0	C						Contract Theory Seminar (De Geest)

Enrolled Units: 9.0 **Semester GPA:** 0.00 **Cumulative Units:** 61.0 **Cumulative GPA:** 3.10

OTHER CREDITS

Semester	Dept	Course	SIS Title	Type	Units	---------Units--------- AP Design Topics	Dean Code	Req. Met	Art Sci	Comments
FL2022	W75	0006	Law School Elective		30.00					Univ of South Dakota

School: **Other Title:** **Original Grade:**

GPA SUMMARY

	Semester Units						Cumulative Units					Level	GPA		
Semester	Cr. Att.	Cr. Earn	P/F Att.	P/F Earn	Trans.	Grade Pts.	Cr. Att.	Cr. Earn	P/F Att.	P/F Earn	Trans.	Units	Sem.	Cum.	Level
FL2022	15.0	15.0	1.0	1.0	30.0	46.7	15.0	15.0	1.0	1.0	30.0	46.0	3.11	3.11	4
SP2023	15.0	15.0	0.0	0.0	0.0	92.9	30.0	30.0	1.0	1.0	30.0	61.0	3.08	3.10	5
FL2023	0.0	0.0	0.0	0.0	0.0	92.9	30.0	30.0	1.0	1.0	30.0	61.0	0.00	3.10	5

ENROLLMENT STATUS

Semester	Start	End	Enrollment Status	Level	Units	Status Change Date
FL2022	8/29/2022	12/21/2022	Full-Time Student	3	16.0	
SP2023	1/17/2023	5/10/2023	Full-Time Student	4	15.0	

DEMOGRAPHICS

Birthdate: 7/26/1998
Birth Place: Lumberton
Date of Death:
Gender: M
Marital Status:
Veteran Code:
Locale:
U.S. Citizen: Y
Country:
Visa Type:
Nonresident Alien:

Race: 9 - Multi-Racial Minority
Hispanic:
American Indian: Y
Asian:
Black: Y
Hawaiian Pacific:
White:
Not Reported:

Semester of Entry:
Entry Status:
Anticipated Deg Dt: 0524
Std Expt Graduation:
Frozen Cohort:
Faculty/Staff Child:
Alumni Code:
Prof. School1:
Prof. School2:
Area of Interest:
Area of Interest Code:

ADMINISTRATIVE CODES - no records of this type found

HIGH SCHOOL - no records of this type found

PREVIOUS SCHOOLS

Name	State	Code	Type Code	Type	Degree	Degree Date	Disciple Code	GPA	GPA Type	Credit
North Car Agr t St U	NC	005003		BS	LIB ARTS	0520		314		

UNIVERSITY EMAIL ADDRESS: f.jabrae@wustl.edu **FORWARDS TO:** f.jabrae@email.wustl.edu

Display Transcript

950333544 JaBrae C. Faulk
Jun 12,2023 11:24 am

This is NOT an official transcript. Courses which are in progress may also be included on this transcript.

Institution Credit Transcript Totals

Transcript Data

STUDENT INFORMATION

Birth Date: 26-JUL
Student Type: Continuing

Curriculum Information

Current Program
Bachelor of Arts
College: Coll of Arts, Human & Soc Sci
Major and Department: Liberal Studies, Liberal Studies
Major Concentration: Pre-Law

This is NOT an Official Transcript

DEGREE AWARDED

Awarded: Bachelor of Arts **Degree Date:** May 09,2020

Curriculum Information

Primary Degree
College: Coll of Arts, Human & Soc Sci
Major: Liberal Studies
Major Concentration: Pre-Law

INSTITUTION CREDIT **-Top-**

Term: Fall 2016

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
ENGL	100	UG	Ideas & Their Expressions I	B+	3.000	9.90	
FRST	101	UG	College Success	D	1.000	1.00	

PHIL	102	UG	Logic	A	3.000	12.00
PHIL	104	UG	Introduction to Ethics	B	3.000	9.00
POLI	110	UG	Amer Government & Politics	C	3.000	6.00
THEA	110	UG	Acting for Non-Theatre Majors	W	3.000	0.00

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	13.000	13.000	13.000	37.90	2.91
Cumulative:	16.000	13.000	13.000	13.000	37.90	2.91

Unofficial Transcript

Term: Spring 2017

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
ENGL	101	UG	Ideas & Their Expressions	B-	3.000	8.10	
MATH	101	UG	Funda of Algebra and Trig I	F	3.000	0.00	E
MUSI	216	UG	Music Appreciation I	D+	3.000	3.90	
PHIL	103	UG	World Religion	C-	3.000	5.10	
PHIL	266	UG	Contemporary Moral Problems	A-	3.000	11.10	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	12.000	12.000	12.000	28.20	2.35
Cumulative:	31.000	25.000	25.000	25.000	66.10	2.64

Unofficial Transcript

Term: Fall 2017

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
BUED	110	UG	Business Computer Applications	B-	3.000	8.10	
CRJS	100	UG	Intro to Criminal Justice	C+	3.000	6.90	

EES	234	UG	Weather and Climate Studies	B	3.000	9.00
HIST	106	UG	African-Amer History to 1877	B	3.000	9.00
SPCH	250	UG	Speech Fundamentals	A	3.000	12.00

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	15.000	45.00	3.00
Cumulative:	46.000	40.000	40.000	40.000	111.10	2.77

Unofficial Transcript

Term: Spring 2018

Additional Standing: Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
CRJS	230	UG	Corrections	B+	3.000	9.90	
MGMT	303	UG	Legal Environment of Business	B+	3.000	9.90	
PHIL	201	UG	Business Ethics	A	3.000	12.00	
SPCH	401	UG	Argumentation and Debate	A-	3.000	11.10	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	12.000	12.000	12.000	12.000	42.90	3.57
Cumulative:	58.000	52.000	52.000	52.000	154.00	2.96

Unofficial Transcript

Term: Fall 2018

Additional Standing: Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
CHEM	100	UG	Physical Science	W	3.000	0.00	
CHEM	110	UG	Physical Science Laboratory	A	1.000	4.00	
LIBS	200	UG	Introduc to Liberal Studies	A	3.000	12.00	

MATH	101	UG	Funda of Algebra and Trig I	C	3.000	6.00 I
PHIL	311	UG	Philosophy of Punishment	A-	3.000	11.10
SOCI	308	UG	Sociology of Marriage & Family	A	3.000	12.00

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	13.000	13.000	13.000	45.10	3.46
Cumulative:	74.000	65.000	65.000	65.000	199.10	3.06

Unofficial Transcript

Term: Spring 2019

Additional Standing: Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
CRJS	313	UG	Criminal Procedure	A	3.000	12.00	
GEOG	210	UG	World Regional Geography	C	3.000	6.00	
LIBS	305	UG	Race and Class in Carib Cultur	A	3.000	12.00	
PHIL	406	UG	Logic for the Legal Profession	P	3.000	0.00	
PHIL	408	UG	Law Humanities the Social Sci	B	3.000	9.00	
SPCH	410	UG	Ethical Issues Communication	A	3.000	12.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	18.000	18.000	18.000	15.000	51.00	3.40
Cumulative:	92.000	83.000	83.000	80.000	250.10	3.12

Unofficial Transcript

Term: Fall 2019

Additional Standing: Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
CHEM	100	UG	Physical Science	B	3.000	9.00	
CRJS	317	UG	Race Class Gendr Crim Jus Sys	A-			

					3.000	11.10
LIBS	317	UG	The Films of Spike Lee	B+	3.000	9.90
LIBS	321	UG	One World Culture	A	3.000	12.00
LIBS	475	UG	Senior Seminar/Capstone	A-	3.000	11.10
PHIL	402	UG	Philosophy of Law	A	3.000	12.00
SPCH	251	UG	Public Speaking	A-	3.000	11.10

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	21.000	21.000	21.000	21.000	76.20	3.62
Cumulative:	113.000	104.000	104.000	101.000	326.30	3.23

Unofficial Transcript

Term: Spring 2020

Term Comments: The Pass/Fail grading option was offered during the Spring 2020 semester in response to the challenges presented by the coronavirus pandemic. Pass/Fail grades and course withdrawals may be related to course disruptions that occurred during that semester.

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
ART	100	UG	Basic Drawing and Composition	B+	3.000	9.90	
ENGL	226	UG	Basic Grammar/Mechanics Write	P1	3.000	0.00	
LIBS	203	UG	Introduc to Women's Studies	P1	3.000	0.00	
LIBS	330	UG	Law and Humanities	A-	3.000	11.10	
PHIL	267	UG	Phil of Love and Friendship	A	3.000	12.00	
PHIL	317	UG	Medical Ethics	P1	3.000	0.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	18.000	18.000	18.000	9.000	33.00	3.66

Cumulative:	131.000	122.000	122.000	110.000	359.30	3.26

Unofficial Transcript

TRANSCRIPT TOTALS (UNDERGRADUATE) **-Top-**

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	131.000	122.000	122.000	110.000	359.30	3.26
Total Transfer:	0.000	0.000	0.000	0.000	0.00	0.00
Overall:	131.000	122.000	122.000	110.000	359.30	3.26

Unofficial Transcript

RELEASE: 8.7.1

Washington University in St. Louis
SCHOOL OF LAW

June 13, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Recommendation for Ja'Brae Faulk

Dear Judge Walker:

I am writing this letter to recommend for your consideration Ja'Brae Faulk, who is applying for a position as a law clerk in your chambers. Based on his extraordinary intellect, exceptional academic background, and passion for the law in its myriad manifestations, I recommend him with the greatest of enthusiasm.

Let me start with Mr. Faulk's academic talents. From my many interactions with him--as my student, research assistant, teaching assistant, and co-author—I note that his understanding of the law is exemplary and that he is has a gift for reaching the crux of legal issues. He graduated from one of the nation's preeminent public HBCU's, North Carolina A&T, cum laude and with Dean's List honors. I note this because his undergraduate study of diverse philosophical thought traditions has translated into an astute and nuanced understanding of legal theory and history.

I also note that Mr. Faulk's commitment to clerking is authentic—he is deeply familiar with judicial chambers, having served as an intern for Robeson Superior Court Judge Tiffany Peguise-Powers during the summer of 2021 and federal district court Judge Staci Yandle last summer. He also worked for a semester with the Federal Public Defender's Office of North Dakota and South Dakota in their judiciary procurement program. Mr. Faulk views clerking as a necessary and crucial next step in deepening his comprehension of the law and regulatory structures and possibilities. I agree and believe that he would bring the same passion and commitment to clerking that he has brought to his academic study of law. Any chambers would be fortunate to have him join its team.

Washington University School of Law was fortunate to recruit Mr. Faulk as a transfer student last year. Some transfer students struggle to adjust to a new law school and to find community. Mr. Faulk is a case study in a successful transfer in every possible way. He has embraced the rich breadth of courses that we offer, exploring every aspect of the law and legal institutions. While he has a particular interest in intellectual property and education law, Mr. Faulk has also explored family and adoption, comparative law, negotiations, and corporate law. He is a true intellectual in the sense that he is deeply curious about the foundational principles that undergird various areas of law. He is the rare law student who seeks out additional readings for his classes—monographs and law review articles. He is voracious reader of all things legal. He is a frequent visitor to my office, brandishing a new book he has discovered and is passionate to share with me. I once referred in passing to a legal scholar, and within a few weeks he had read everything she had written and had a deep grasp on her scholarly interventions and career-long trajectory.

As a student in my class, Race and the Law, Mr. Faulk's mind literally stunned me. I have been studying this field for over thirty years. Yet several times, Mr. Faulk pulled his reading glasses up, peered out at me from the back row of the class, and set out a framework for understanding the legal questions that I had never encountered. It was, as I said, nothing short of stunning. I found myself racing to capture his insights on the class whiteboard, sketching out the contours of his insights and arguments, and later, after class, emailing with him to flesh out the claims and arguments. He is a tremendous student of the black letter law, legal and political institutions, regulatory structures, and the human element. He organically brings all of these together into what I know will be defining frameworks for future generations to encounter and interpret the law.

Not surprisingly, I hired Mr. Faulk as my research assistant during the fall semester, so that I could leverage his organic labor without guilt. We began to dissect each class together and compile a new syllabus for the next iteration of the class, as well as for the new class I am teaching this fall on Critical Race Theory. It is a testament to Mr. Faulk that I have hired him as my first ever Teaching Assistant. In this capacity, he is helping to design the syllabus and assignments, devouring cases and Law Review articles on the topic. Lest you fear that I am exaggerating my regard for Mr. Faulk's intellect and grasp of the law, let me share a brief example. Last fall Mr. Faulk was reminding me that the deadline for final exam was approaching and I jokingly told him that he should try writing a law school issue spotter. He did. And it was so good that I used it as the basis for an actual question. I share this to reinforce the extent of Mr. Faulk's grasp of the nuances of the legal doctrine and the foundational issues and conflicts that law raises.

Adrienne Davis - adriennedavis@wustl.edu

Mr. Faulk has become one of my principal interlocutors in all things law, not only course design, but also an unbelievably gifted editor of my writing. This is an especially important skill to highlight for Mr. Faulk. He is a gifted writer, lucid, persuasive, and elegant. I believe he would be an outstanding clerk in terms of writing memos and other documents that might be required. He has an expansive vocabulary, and, on occasion, he misuses a word, but this is something to which he has become attentive.

In addition to the academic and intellectual mandates, clerking requires strong relational skills and emotional intelligence. Mr. Faulk has this in abundance. As I noted, he transferred to Washington University this year and in a short period of time has fully integrated himself into our community. He is an active member of the Black Law Students Association and is a mentor to 1L students. He is an influencer among his peers and, from my observations from afar, seems to on occasion play a key role in resolving conflicts. At his previous institution, South Dakota Law, he was also a leader, as a member of the Native American Students Association, President of the Black Law Students Association, and, as an important indicator of the institution's confidence in him, a student member of the faculty hiring committee. In sum, Mr. Faulk's demonstrated ability to integrate himself rapidly and meaningfully into a small community bodes well for his future success as a law clerk.

I also want to say a word about how clerking would fit into Mr. Faulk's career horizon. I believe he could be an outstanding lawyer in any number of fields, intellectual property, education law, or civil rights if he chose. However, at this point he aspires to become a legal academic. This makes sense to me, as I have never met a student more organically passionate about the law than Mr. Faulk. He will have the opportunity to test this out this fall as he will be a Teaching Assistant for me and also an instructor for a course the School of Law regularly offers to undergraduates, Law, Gender, and Justice. I note that there is a highly competitive process for choosing the course instructors and it is an incredible honor and signal of the institution's confidence in Mr. Faulk's academic and professional accomplishments that he was chosen.

Finally, I note that Mr. Faulk grew up on the margins of society and is now thriving at its arguable center. He is a first-generation law student from a low-income background and was raised by his mother after his father passed away. He identifies as African American and Native American and brings both sensibilities to his world. He hails from Robeson County in North Carolina, which was the poorest county in the country for many years and is the home of the Lumbee, a tribe that has been seeking federal recognition for half a century. (I have learned a lot about the tribe from Ja'Brae.) More recently, Mr. Faulk lived in the D.C./Maryland/Virginia Metro area, an area in which his identity as a Black man was particularly salient. Mr. Faulk holds his identities not as a chip on his shoulder, but rather as invitational to connection with others. He is authentically true to himself, while also embracing all aspects of others' identities. I believe he brings unique perspectives that would benefit any judicial chambers.

In sum, I believe Mr. Faulk would prove an asset to your or any chambers. He has the analytic mind, research skill set, intellectual passion, and personal skills to succeed as a law clerk. If you have any questions regarding Mr. Faulk's application or qualifications, please do not hesitate to contact me at adriennedavis@wustl.edu.

Best,

/s/

Adrienne Davis
Vice Provost
William M. Van Cleve Professor of Law

Washington University School of Law
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(314) 935-6420

UNIVERSITY OF
SOUTH DAKOTA
KNUDSON SCHOOL OF LAW

March 28, 2023

To whom it may concern:

It is my pleasure to write in support of Ja'Brae Faulk as a candidate for a judicial law clerk position. I believe Ja'Brae is a student of great potential who would be a very good judicial law clerk.

I was fortunate to meet Ja'Brae in his first year in law school. I would talk to him in the hallway as I do with many law students, but Ja'Brae took extra time to come to my office and meet. He asked thoughtful questions about legal study, his career path, and issues facing the law school. From the beginning, Ja'Brae sought to get involved beyond the classroom and to seek out mentorship.

I did not have Ja'Brae in class, but I know that his academic performance continued to improve during his time in law school. I believe that this reflects his willingness to take feedback, evaluate it and his performance, and thoughtfully incorporate feedback to improve. This is invaluable for any lawyer. Ja'Brae is an individual who continues to pursue growth rather than to simply be comfortable with the status quo. I believe that the lessons provided in a judicial clerkship would facilitate his ongoing growth and that he would be a clerk who continued to provide better and better work product.

Ja'Brae engages with people around him. He was actively involved in student life and made friends readily. He pushed other students to have difficult conversations about justice in important but respectful ways. Ja'Brae strives to understand the world around him as it is and as it can be. I think the experience of clerking will facilitate his ability to effectuate change and that he will be willing to share observations about how the justice system can improve.

Lastly, Ja'Brae is an energetic and engaging presence in his community. Having a cohesive and collegial team in chambers is important. I believe that Ja'Brae would be an excellent addition personally as well as professionally.

I am happy to answer any follow-up questions.

Sincerely,

Neil Fulton
Dean, University of South Dakota Knudson School of Law
414 E. Clark Street
Vermillion. SD 57069
605-658-3508
Neil.Fulton@usd.edu

UNIVERSITY OF
SOUTH DAKOTA
KNUDSON SCHOOL OF LAW

April 20, 2023

Re: Recommendation for Ja'Brae Faulk

Dear Judge:

Please accept this very enthusiastic recommendation for Ja'Brae Faulk to serve as a clerk in your chambers. I taught Ja'Brae criminal law in fall 2020 and criminal procedure in spring 2021, before he transferred to Washington University School of Law. Although both of my classes with Ja'Brae contained nearly eighty students, he stood out memorably through his exceptional contributions and insights. I was delighted that he reached out to me for a letter of recommendation. Ja'Brae is easily among the top five students that I would most enthusiastically recommend for a clerkship from the years I have been teaching at USD.

In Ja'Brae's time at USD, he made invaluable contributions to the intellectual life of our community, and not only through his leadership as President of the Black Law Students Association. His first semester, in fall 2020, began after the summer of nationwide protests in response to the murder of George Floyd, and Derek Chauvin's conviction arrived shortly before the final day of criminal procedure in spring 2021. Ja'Brae was the only male African American student in his 1L class at USD Law. His participation in our class discussions was transformative.

Ja'Brae was able to offer insights that no other student could, and his willingness to question the basic assumptions that are built into the traditional criminal law and criminal procedure curriculum expanded the conversation in extremely fruitful ways that I would have struggled to bring about on my own. Without Ja'Brae's contributions, the conversations throughout the year would have been much more limited and less enlightening for the many students who came from small towns in the region and had little exposure to or awareness of racial injustice in the U.S. criminal justice system.

I have no doubt that being in Ja'Brae's position imposed a great burden—on top of the usual, very significant challenges of 1L, and the additional challenges of attending law school during a pandemic. He carried the extra burden with determination and grace, and the entire law school benefitted from his generosity. Now that I know Ja'Brae is also a first-generation law student from a low-income background, raised by a single mother in Robeson County, North Carolina, his achievements seem even more extraordinary.

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gregory.brazeal@usd.edu • ssrn.com/authorid=1539900

It was a great loss for USD Law when Ja'Brae transferred, although I appreciated the reasons behind his decision. There were and are extreme political divides in the student population, including what could fairly be described as deeply reactionary views among a small number of students. During an office hours visit with me, to take one example, a student expressed skepticism regarding Chauvin's responsibility for Floyd's death, arguing that Floyd died as a result of "excited delirium" due to drug use. Other students have expressed skepticism in class regarding the extent of discrimination against African Americans in U.S. history. Meanwhile, in Ja'Brae's second year, the state Board of Regents directed the closure of diversity centers on all state university campuses.

Law school is hard enough without having to be the only male African-American student in a politically polarized law school class in the middle of a nationwide debate on racial injustice in the U.S. criminal justice system. No law student should have to carry the burden that Ja'Brae carried during his years at USD. But it is a testament to his exceptional character that he was able to carry those burdens so successfully. At the law school, he is still very much missed.

In part because of Ja'Brae's experiences in South Dakota, I believe he will be able to offer a unique perspective as a clerk. I would be surprised if there are more than a handful of law students in the country who can speak with Ja'Brae's authority and insight about *both* the racial injustices of policing and criminal punishment in a large city such as Baltimore *and* about the racialized politics of criminal justice in a largely rural state such as South Dakota. The ability to speak across this rural-urban divide may become increasingly important in discussions of racialized mass incarceration in the United States as reforms continue to move forward sporadically in many large cities while meeting resistance in many rural areas. Ja'Brae is very well-positioned to become a leader in these conversations.

If I were a judge, I would not hesitate to hire Ja'Brae as a clerk. He is a highly driven, kind, insightful critical thinker and leader who will add a unique and urgently needed perspective to any judge's chambers. He is also a pleasure to work with. If you have any questions or would like to discuss Ja'Brae's application further, please do not hesitate to reach out.

Sincerely,

Greg Brazeal
Assistant Professor
USD Law School

FEDERAL PUBLIC DEFENDER
Districts of South Dakota and North Dakota
101 South Main Avenue, Suite 400
Sioux Falls, SD 57104

Jason J. Tupman
Federal Public Defender

Telephone: (605) 330-4489
Fax: (605) 330-4499

April 20, 2023

Dear Judge:

I am writing to recommend Ja'Brae Faulk for a judicial clerkship. I am an Assistant Federal Public Defender for the District of South Dakota, and I work in the Sioux Falls office. Ja'Brae was an intern with our office during spring 2022, and I was his direct supervisor. Based on my personal observations of Ja'Brae's work ethic and his temperament, I highly recommend him for a judicial clerkship.

Our office selected Ja'Brae as an intern based on his academic interests, his involvement in law school activities, and his commitment to indigent criminal defense. During his internship, Ja'Brae attended court hearings and client meetings, reviewed discovery, conducted legal research, and drafted documents. Ja'Brae displayed an excellent work ethic. He was inquisitive, positive, and self-motivated.

Ja'Brae demonstrated an ability to synthesize large quantities of discovery and conduct legal research on a wide variety of topics. He drafted motions for downward variance, sentencing memoranda, and legal research memoranda. He completed assigned projects in a timely manner and actively sought out new opportunities.

Ja'Brae has an excellent temperament. He was professional and respectful in his communications with our office staff and the court. He worked well as part of a team and actively engaged in case discussions. Ja'Brae brought a unique perspective to our work and a strong commitment to diversity. Most importantly, he treated all our clients with dignity and respect. If you would like to discuss this recommendation further, please do not hesitate to contact me at (605) 330-4489 or amanda_kippley@fd.org. Thank you for your consideration.

Sincerely,

Amanda D. Kippley
Assistant Federal Public Defender

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 15-cr-30075-SMY**
	)	
TERRELL MCGEE,	)	
	)	
Defendant.	)	

ORDER

YANDLE, District Judge:

Defendant Terrell McGee was sentenced on August 17, 2017, to 300 months imprisonment for conspiracy to interfere with commerce by robbery (two counts), interference with commerce by robbery (two counts), and carry and use of a firearm during a crime of violence (two counts) pursuant to a written plea agreement (Doc. 175). McGee is currently housed at FMC-Devens and his projected release date is January 6, 2039.

Now pending before the Court is McGee's Motion for Compassionate Release pursuant to the First Step Act of 2018 in which he seeks release due to the COVID-19 global pandemic (Doc. 298). The Government has responded in opposition (Doc. 304). For the following reasons, the motion is **DENIED.**

Background

COVID-19 is a contagious virus spreading across the United States and the world. Individuals with serious underlying medical conditions, such as serious heart conditions and chronic lung disease, and those who are 65 years of age and older carry a heightened risk of illness from the virus. People Who Are at Higher Risk for Severe Illness, CENTERS FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-

precautions/people-at-higher-risk.html (last visited June 21, 2022). As of June 28, 2022, there was one positive COVID-19 case among inmates and no positive staff members at FMC-Devens. Unfortunately, 13 inmates have died at FMC-Devens since the pandemic began. *See* https://www.bop.gov/coronavirus/ (last visited June 28, 2022). FMC-Devens has a current inmate population of 957. *See* https://www.bop.gov/locations/institutions/mcr/ (last visited June 28, 2022).

McGee is 31 years old and has suffered a pulmonary embolism (Doc. 298). He states that he is at risk for severe illness due to his condition and the continued presence of COVID-19 at the facility. He also asserts that the stacking of his 924(c) convictions should be considered under the First Step Act for compassionate release and that his mother requires assistance in caring for his son while he is serving his term of imprisonment. *Id*.

Discussion

The spread of COVID-19 has presented extraordinary and unprecedented challenges for the country and continues to present a serious issue for prisons, despite the safety protocols and policies that have been implemented. Section 603 (b)(1) of the First Step Act permits the Court to reduce a term of imprisonment upon motion of either the Director of the Bureau of Prisons ("BOP") or a defendant for "extraordinary or compelling reasons" so long as the reduction is "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A)(i). A defendant seeking compassionate release must first request that the BOP file a motion seeking the same. *Id*. If the BOP declines to file a motion, the defendant may file a motion on his own behalf, provided he has either exhausted administrative remedies or 30 days have elapsed since the warden at his institution received such a request, whichever is earliest. *Id*.

McGee alleges that his diagnosis of a pulmonary embolism puts him at a heightened risk

for COVID-19 infection. According to the CDC, individuals diagnosed with a pulmonary embolism may be at an increased risk of severe illness if they contract COVID-19. (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html). Significantly, however, McGee has refused to take the vaccine and has failed to demonstrate that he is unable to medically benefit from the vaccine

Exposure to COVID-19 is the same whether a person is confined or in the free world. Thus, an inmate refusing the vaccination may not benefit from compassionate release without presenting evidence that demonstrates he or she is unable to benefit from the vaccine. *See United States v. Barbee*, 25 F.4th 531 (7th Cir. 2022); *United States v. Broadfield*, 5 F.4th 801, 803 (7th Cir. 2021) ("A prisoner who can show that he is unable to receive or benefit from a vaccine still may turn to [the compassionate release] statute."). McGee has presented no such evidence.

McGee also contends that the First Step Act's changes to the 924(c) penalty structure presents extraordinary and compelling reasons for compassionate release because his sentence would be substantially less if the First Step Act was in effect at the time of his conviction. But the Seventh Circuit has held that non-retroactive changes in sentencing law do not constitute extraordinary and compelling reasons for compassionate release; new sentencing laws cannot alter a person's pre-existing sentence unless the law was enacted to do so *United States v. Thacker*, 4 F.4th 569, 575 (7th Cir. 2021). As the Court explained, Congress intended the anti-stacking amendment to be applied prospectively only – to sentences imposed *after* ratification of the First Step Act. *Id* at 574. As such, McGee is unable to benefit from the First Step Act's changes to the 924(c) penalty structure.

Lastly, McGee asserts that he is the primary caretaker for his minor son and his mother is "struggling to [omit] take care of him on her own." (Doc. 298, at p. 1). While the Court

understands McGee's concerns in this regard, they are not extraordinary and compelling reasons for release under the First Step Act of 2018.[1]

For the foregoing reasons, Defendant's Motion for Compassionate Release pursuant to 18 U.S.C. § 3582 (c)(1)(A) as amended by the First Step Act of 2018 (Doc. 298) is **DENIED**.

IT IS SO ORDERED.

DATED: June 28, 2022

STACI M. YANDLE
United States District Judge

[1] Given the absence of extraordinary and compelling reasons to support McGee's request for release, the Court need not consider the 3553(a) factors. That said, the Court believes that nature of and facts and circumstances surrounding the crimes he committed and his conduct while incarcerated weigh heavily against his release. McGee was convicted for his participation in two violent robberies in which the individuals were shot and seriously wounded during both. Since his incarceration, he has acquired 14 violations (Doc. 304, at p. 16; 304-3). Thus, he continues to pose a significant danger to the public.

[1][2]Interest Re-Convergence: Bell's Implicit Theory

"History has validated the concerns which motivated us back then. Time has vindicated us; we were prophets, not heretics."

- Kevin Brown

Attacks on critical race theory and diversity have occurred since the emergence of both concepts. Derrick Bell's initial critiques of the shortcomings of Brown v. Board, which instigated a theoretical group that matriculated into mainstream academics and society, is being eliminated across the nation. Bell's astuteness in his arguments has become one of the most useful tools in identifying the current status of Black existence and its interplay with dominant American culture. While a positive understanding of Bell's theory of interest convergence is instrumental in conceptualizing the factors influencing the Brown decision, a contrapositive understanding of this theory holds equal value in conceptualizing the elimination of CRT and diversity from educational spheres and will show Bell had a pristine gaze into the future. This essay attempts to reanalyze the conceptualizations of Bell's theory regarding the defectiveness of the American government as it seemingly set aside its obligations for racial equality under the Fourteenth Amendment and the Brown decision to remedy racial disparity. This essay draws connection between the emergence of CRT as theorem and the emergence of diverse concepts introduced into the academy and society and draws largely on Bell's theory of interest convergence when analyzing the current status of these concepts. This essay argues the realignment, or "re-convergence", of interests of white elites with working class and poor whites has influenced acts beyond subordination of Black people in America and connects the elimination of CRT and diversity to racial obliteration.

[1] [This is the most current version of my article to be submitted for publication in the near future]
[2] [Portions of this paper have been significantly reduced to fit the page limit for clerkship applications]

Intro

Nearly forty years ago, Harvard law professor Derrick Bell analyzed the decision in *Brown v. Board of Education*[3] through a novel lens from the traditional realm of legal scholarship. In his article, *Serving Two Masters*[4], Bell argued that the strategy behind the litigation of *Brown* was driven by what he calls "'public interest' lawyers" who believed the resolution to the educational needs of black children was integration into white schools.[5] Bell identifies the issues within this schema, ultimately used to desegregate the social spheres of society, as a challenge to segregation that often led to results antithetical to the needs of the communities they represented and what those communities desired for their own educational benefit. In his subsequent essay, *The Interest-Convergence Dilemma*[6], Bell outlines a theoretical framework for the developments in his previous work. Specifically, Bell argues the decision rendered in *Brown* abolishing the doctrine of "Separate but Equal" in the interest of African Americans was determined by convergences with the interests of the white majority. Yet, as Bell articulates, this granting of rights is not the ideal anti-subordination driven decision, due largely to the Fourteenth Amendment's ineffectiveness in providing remedies that disrupt the "superior societal status of middle- and upper-class whites."[7] Bell's critiques of the *Brown* decision was a catalyst for the emergence of a new body of theoretical and scholarly developments, holistically referred to as Critical Race Theory (CRT).[8]

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[3] *Brown v. Board of Education*, 347 US 483 (1954)
[4] Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE. L.J. 470 (1976)
[5] Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas, *Critical Race Theory: The Key Writings That Formed the Movement*, , 5 (1st ed. 1995) [insert part about editors and compilation]
[6] Derrick A. Bell Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 Harv. L. Rev. 3 (1980)
[7] *Id*.
[8] Jelanie Cobb, *The Man Behind Critical Race Theory*, Annals of Equality, NewYorker.com (Sep. 13 2021) (https://www.newyorker.com/magazine/2021/09/20/the-man-behind-critical-race-theory) ; *See* Owolade *infra* note 7

Bell has since been referred to as "the God Father of Critical Race Theory"[9] as his work was the first major piece of legal scholarship to "challenge the ways in which race and racial power are constructed and represented in American legal culture"[10] by interrogating the realities of the *Brown* decision and its effects on the education standards for black students. Bell's thought-provoking critiques of *Brown* sparked much attention in the post-segregation era as the cultural as the shift towards integration had been met with insular opposition, which came to be known officially in the southern states as Massive Resistance.[11] Regardless, Bell shifted the dynamic of academics of color in the American education structure by capturing and theorizing common cultural understanding of race and its interplay with the law.

Legal scholars were collaborating in critical studies workshops prior to the emergence of CRT[12], but, as previously mentioned, after Bell's 1976 and 1980 articles, these scholars began meeting

[9] Hani Morgan, *Resisting the Movement to Ban Critical Race Theory From Schools*, 95 The Clearing House: A J. of Educ. Strategies, Issues and Ideas 1 (2022) (citing Tomiwa Owolade, *The Godfather of Critical Race Theory*, Unherd.com (Dec. 9, 2021) (https://unherd.com/2021/12/the-godfather-of-critical-race-theory/)

[10] Crenshaw et al, *supra* note 3, at 3

[11] *Id*; Ira M. Lechner, *Massive Resistance: Virginia's Great Leap Backward*, 74 VA Quarterly Rev. 4 (1998) ([Senator] Byrd formally announced his strategy: "If we can organize the Southern states for massive resistance to this order [of the Supreme Court], I think that in time the rest of the country will realize that racial integration is not going to be accepted in the South." Massive Resistance was born, bred, and nurtured by the senior United States senator from Virginia.); Brent J. Aucoin, *The Southern Manifesto and Southern Opposition to Desegregation*, 55 The AK Historical Quarterly 2, 1 n.2 (1996)(The manifesto was printed in the Congressional Record, 84th Cong., 2nd sess., (March 12, 1956), 4459-4464. For the full text of the 'Declaration of Constitutional Principles," and a listing of all the signers, see Appendix A. Nineteen of the twenty-two senators from the ex- Confederate states (the definition of the South in this essay) signed the manifesto. They were joined by eighty-two of the region's ninety-six representatives.); [little rock nine and ruby bridges]

[12] *Id* at xviii (By the late seventies, Critical Legal Studies existed in a swirl of formative energy, cultural insurgency, and organizing momentum: it had established itself as a politically, philosophically, and methodologically eclectic but intellectually sophisticated and ideologically left movement in legal academia, and its conferences had begun to attract hundreds of progressive law teachers, students, and lawyers; even mainstream law reviews were featuring critical work that reinterpreted whole doctrinal areas of law from an explicitly ideological motivation.); *Id* at xxvii (The 1986 and 1987 CLS conferences this marked significant points of alignment and departure and should be considered the final step in the preliminary development of CRT as a distinctively progressive critique of legal discourse on race.); Duncan Kennedy & Karen E. Klare, *A Bibliography of Critical Legal Studies*, 94 Yale L. J. 2 n.1 (1983) (Critical Legal Studies is a movement of lawyers, law teachers, social theorists, and students who are

to consolidate their evaluations of dominant American culture, white supremacy, and disparate treatment within the law.[13] This intricate group of diverse thinkers, or, the originators of CRT, began meeting in the summer of 1989 in Madison Wisconsin.[14] Twenty four law scholars—organized by Kimberlé Crenshaw, Neil Gotanda, and Stephanie Phillips, and including Kevin Brown, Mari Matsuda, Richard Delgado, Trina Grillo and others—were invited to the first workshop in Madison in an attempt to articulate, conceptualize and consolidate theoretical critiques of "racial politics in America."[15] Subsequent CRT workshops led to additional scholars—including Adrienne Davis[16], Lani Guinier, and Regina Austin—joining the efforts in interrogating racial ideologies in American political culture.

The Emergence of CRT

Bell's catalytic inquiries into the *Brown* decision attracted curious minds as to the subordination of Black people and racial hierarchies in American culture. As explained by an original participant of the CRT workshops, Kevin Brown:

> "Our CRT discussions were primarily focused upon the structure of the Supreme Court's racial justice jurisprudence, but we recognized that there is an important relationship between racial jurisprudence and mainstream American views on racial inequality. Courts do not operate independently of the cultural values of

directly or indirectly linked to the Conference on Critical Legal Studies (CCLS). The CCLS was founded at a meeting in Madison, Wisconsin in 1977; of the approximately 50 participants, a majority were academics in either law or the social sciences. Since then, CCLS has become a member- ship organization and has sponsored eight national conventions and five "summer camps" to discuss a variety of topics in the theory, teaching, and practice of law.)

[13] *See generally* Kimberlé Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CT L. Rev. 5 (2011)

[14] *Id*; Kevin Brown, *Critical Race Theory Explained By One of the Original Participants*, NYU L. Rev. (online feature) (2023)

[15] *Id*; Crenshaw *supra* note 11, at 1299.

[16] I currently serve as a Research Assistant to Professor Davis, and in essence of the mentorship she provides me, my understandings of CRT are largely shaped from her many reflections and perspectives for which she provides immense clarity.

> American society. Rather, there is an exchange between those cultural values and the courts' interpretations of the law— they interact with and shape each other."[17]

Produced out of these workshops were driving thoughts behind the canonical readings of CRT. The scholars in attendance began widely publishing their critiques and newfound theories of American culture and racial justice in academic journals across the nation. Renowned literature with CRT frameworks began circulating in workshops, lectures, and conferences, such as a *Critique of "Our Constitution is Color-blind"*[18], *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*[19], and *Looking to the Bottom: Critical Legal Studies and Reparations*[20]. Furthermore, concepts like " whiteness as property"[21] and "intersectionality"[22] gained widespread attention in the academy.

Although the CRT workshops ceased in 1997[23], the newly established framework continued through the twenty-first century, and CRT became a normalized, substantive course in law schools and graduate schools throughout the country. Student and faculty advocacy and activism

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[17] Brown *supra* note 12 at 137.
[18] Neil Gotanda, *Our Constitution Is Colorblind*, 44 Stan. L. Rev. 1 (1991).
[19] Derrick Bell, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 80 Yale L.J. 1325 (1971).
[20] Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323 (1987).
[21] Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707 (1993).
[22] Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241 (1991).
[23] Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 Denv. U. L. Rev. 329 n.97 (2006) (The reason for the cessation of the CRT workshops, as far as I can tell, was that the work- shop lacked a firm institutional framework to perpetuate its continuation. CRT scholars attending a workshop would be asked or volunteer to host the next workshop at their school the following year. A committee would then be established to guide the program. This differed from the process eventually established by LatCrit conference where host were identified and secured two years in advance and worked with standing officers and officials.
At the 1997 CRT workshop, Robert Westley, a coordinator of the workshop together with Sumi Cho, approached Stephanie Phillips about hosting the CRT workshop for the following year. **1,**who was attending the CRT workshop for the first time and was at that time an adjunct faculty member at the University at Buffalo Law School, encouraged her. Stephanie, however was always reluctant to host the conference again, having hosted a workshop in the early nineties. I did not push her on this and later went on to host another project. Thus, we unwittingly became part of the story of the workshop's demise.)

led to the inclusion of a course focused on the racial implications of legal doctrine into institution curricula.[24] Regardless, scholars publishing in the area began to harvest the fruits of their labor by receiving tenure and tenure-track faculty positions, endowed professorships, and deanships.[25] These scholars circulated their theorem through many channels of academia, ratifying their studies into substantive books and courses designed to teach the ideas of CRT.[26] Francisco Valdes's 2002 examination of the presence of courses focused in Latcrit[27] studies with supplementary inquiries into race or CRT courses that cover Latinx identity in law schools notes there were 20 institutions with curriculum offering courses thereof.[28] Moreover, Valdes's study shows most of these courses were taught by faculty members of color, which when analyzed through a critical theorist lens, proves arguments of the importance of epistemological

[24] Crenshaw *supra* note 11, at 1263. (In describing the committee overseeing invitations and admission to the first CRT workshop, Crenshaw finds, "[they] were all veterans, in one way or another, of particular institutional conflicts over the nature of colorblind space in American law schools."); *See generally* Crenshaw et al *supra* note 3, at xx-xxii (description of conflict at Harvard Law after Derrick Bell's protestation of a lack of woman of color on the faculty.)

[25] *See* Laura Taylor, *Prof. Bell Named U. of Oregon Law Dean*, 70 Harv. L. Rec. 5, 1 (1980); Angela Onwuachi-Willig, *Celebrating Critical Race Theory at 20*, 94 Iowa L. Rev. 1497, n.5 (2009)(For example, in 2008, the Connecticut Law Review dedicated an entire symposium issue to analyzing the impact of just one foundational article in CRT: Charles R. Lawrence Ill, *The ld, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN, L. REV. 317 (1987)… Additionally, in April of 2008, students at Yale Law School organized a conference that was specifically designed to "consider the development of the field [of CRT], the extent of its impact on legal practice, and its future frontiers." Yale Law School, Frontiers in Social Justice Lawyering: Critical Race Revisited.)

[26] Angela Onwuachi-Willig, *On Derrick Bell as Pioneer and Teacher: Teaching Us How to Have the Nerve*, 36 Seattle U. L. Rev. xlii-xliii (2013) [any books with CRT framework]

[27] Mutua *supra* note 23, at 351. (The critique of the white over black paradigm opened the window of recognition into the ways that the racialization of other groups in- volved the interplay of laws and practices not readily exposed by looking at the domestic experiences and conditions of blacks in the United States. It thus, opened doors for CRT to examine the relationship between race and ethnicity, racism, and nativism, and racism, nationalism, and colonialism. It also brought into focus laws related to immigration, citizen- ship, foreignness, language, and assimilation, among other issues as they related to U.S. foreign policy, and transnational and international law. These insights together with the way in which some Latina/o scholars, such as Francisco Valdes, experienced the workshop conflicts led them to institutionalize a separate space for the exploration of issues germane to Latina/o communities and Latina/o identity.)

[28] Francisco Valdes, *Barely at the Margins: Race and Ethnicity in Legal Education -- A Curricular Study With LatCritical Commentary*, 13 Berkeley La Raza L.J. 119 (2002).

perspectives to provide anecdotal instruction of race-based courses in the academy.[29] Furthermore, it garnered CRT's momentous esteem in academia.

Attacks on affirmative action led to institutions divisive use of race in their admissions processes.[30] As the predictions of CRT scholars regarding ineffective judicial remedies to school desegregation began manifesting throughout the nation, particularly in southern states[31], institutions with liberal and leftist agendas attempted to combat the eradication of diversity in the use of their admissions procedures. The University of California at Los Angeles (UCLA) became the first elite law school to offer a concentration in CRT[32] notwithstanding challenges to affirmative action exponentially growing stronger.[33] The Court's pendulum shift towards colorblindness as an equitable remedy led to societal trends in representative diversity being abandoned. As Kevin Brown explained, "there is an important relationship between dominant American cultural attitudes about racial justice and the law's treatment of the issues of racial inequality."[34] Derivatively, as Cheryl Harris observed years before, "the imposition of colorblind rules in the community context of UCLA revealed, what much of CRT implies—that, given the normative and social structure of the United States, colorblindness is a proxy for whiteness."[35] Political objections to race conscious policies enacted to benefit communities of color were severely limited under white supremacists' efforts to underline colorblindness as an effective means to deal with the societal position of Black Americans. When analyzed through the lens of Bell's interest convergence theory, this result was predictable; Black presence in academia

[29] Matsuda *supra* note 18
[30] *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)
[31] Brown *supra* note 12 at 104
[32] Mutua *supra* note 23 at 352]
[33] *See Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003)
[34] Brown *supra* note 12 at 107
[35] Mutua *supra* note 23 at 353

threatened racial hierarchies and white supremacy in America, thus, white elites eliminated affirmative action programs to reinforce education disparities between Black people and their white counterparts.

Despite widespread attempts to disenfranchise institution of their commitments to diversity and following the combativeness to white supremacy in academia by UCLA's example, other institutions like Harvard and Stanford joined the forefront advocates for diversity.[36] And their practices yielded positive results in some respect.[37] Moreover, the originators of CRT were matriculating to higher positions in academia and society as their works began to hold prestige inside the academy.

In today's era of legal studies, it is expected for an institution's curriculum to contain a CRT course or some variation thereof. Even law schools located in what are considered the most conservative areas in the nation have courses examining the racial implications of the legal doctrine or critical theory. Many of these courses are taught by the originators of CRT scattered throughout the nation, while others are taught by the wave of scholars succeeding the original members of the movement. With the normalization of these courses implemented into institutional curricula, the recent challenges by legislators may have shocked observers as the fervent attacks on CRT began, but, in what I will describe as "interest re-convergence," that, as Bell explained, is constantly assuring of racial subordination in American culture, these attacks were expected, and respectively, predicted by critical scholars.

[36] *Id* at note 28; *Grutter v. Bollinger*, 539 U.S. 306 (2003)
[37] *See generally* Brown *supra* note 12

Kevin Brown's essay, *Critical Race Theory Explained by One of the Original Participants*[38], articulates recent political attention towards CRT initiated by former-President Donald Trump who "sought to exclude diversity and inclusion training from federal contracts, if those trainings contained so-called 'divisive concepts' like stereotyping and scapegoating based on race and sex." Brown further explains how former-President Trump's Executive Order[39] is what sparked the widespread attacks on CRT and diversity across the nation.[40] Brown continues,

> These attacks on CRT are directed towards preventing efforts to teach the history of American racial oppression, as well as preventing diversity, equity, and inclusion training today. It is part of an antidemocratic effort to attenuate the multiracial democracy that America is becoming and to obscure the continued racial inequality that exists.[41]

In examining these fanatical attacks by the federal government and their continued efforts towards a colorblind society, a recategorization or reevaluation of subordination is necessary in a capitalistic regime that already determines the livelihoods of people of color in society based on their proximity to Blackness. Moreover, as legal scholar Michelle Alexander explains, "the emergence of each new system of control may seem sudden, but history shows that the seeds are planted long before each new institution begins to grow."[42] Thus, one examining is left to ask, what essentially is the end-goal of institutions and their leaders under thrall of colorblindness? What is a more stringent form of subordination and what is sought of the additional parameters of enforcing this subordination? Lani Guinier and Gerald Torres note in *The Miners Canary*,

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[38] Brown *supra* note 12; Thanks to Professor Kimberley Norwood, Our Education Law class at Washington University School of Law was able to hear Kevin Brown's iterations of his article in-person. It was both exhilarating to be witness of Professor Brown, and, disheartening to learn of the expected defeat in the present-day struggle for equitable education in America.
[39] *Id*.
[40] Brown *supra* note 12 at 102
[41] *Id*.
[42] Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press 2010).

"[o]nce Blackness becomes the face of failure, race then influences and constrains social, economic, and political opportunities among and between Blacks and whites and among and between Black people and other people of color.[43] In what I classify as "racial obliteration" can be used to understand the results of the re-converging of interest between elite whites and poor whites under the current racial hierarchy in modern American society, and the dominant culture's expectations of subordination where a society has achieved supremacy for the racial categorization of whiteness—devoid of class identity. [44]

CRT IMPACT ON PUBLIC EDUCATION

[SECTION TO LINK THE VALIDATION OF CRT CONCEPTS IN GRADUATE SCHOOLS TO THE EMERGENCE OF AFRICAN AMERICAN STUDIES PROGRAMS IN COLLEGIATE AND K-12 EDUCATION SPACES]

Interest Divergence

As Bell's theory of interest convergence can be used to conceptualize the constitutional principle driving the *Brown* decision, many variables persisted throughout this era and contributed to the machinations of racial subordination. As the renowned legal scholar Lani Guinier interprets in furtherance of Derrick Bell's theory of interest convergence, there was a simultaneous diverging of geographic, racial, and class-based interests at work in the Brown and post-Brown era.[45] Guinier further explains the divergence between elite whites and poor whites occurred thoughtlessly as these groups sought to preserve their supremacy through their racial identity.

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[43] Lani Guinier, From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma, 113 Yale L.J. 1073 at 109 (2004)

[44] Arguing white people have supremacy beyond real time experiences as white people. There are instances where simply being categorized as white positions a person ahead of a person of color, such as income, housing, and disaster disparities.

[45] Guinier *supra* note 41 at 98

She classifies the ideology of racial liberalism as the mechanism causing "the class and geographic interests of rural and poor southern whites—and of working-class northern whites—also receded from view. The poor whites who could not participate in de facto[46] segregation or white flight[47] viewed themselves at victims and recognized desegregation as downward economic mobility.[48] Guinier brilliantly explains the exploitation of the sense of loss felt by poor whites by "demagogic politicians, who have successfully used racial rhetoric to code American politics to this day and who continue to solidify the bargain between poor and wealthy southern whites."[49] Finally, she notes the regional differences between these two classes are non-existent when race and class are disaggregated.

CRT and the Interest Re-Convergence Dilemma

As explained, Bell's theory argues that the "interests of Blacks in achieving racial equality will be accommodated only when it converges with the interests of whites," and our current constitutional remedies will not provide effective racial equality for Blacks where it would threaten the supremacy of the white elite class." Black rights are granted under the influence of these convergences. Implicit of this theory is that Black rights are repealed when progression of the Black community threatens the regulatory regime of the racial hierarchy in America, causing the interests of the white elites to realign or "re-converge" with poor and working-class whites to preserve the order. I argue that the occurrence of this re-converging of interests or preservation

[46] *Id* at 102
[47] William H. Frey, *Central City White Flight: Racial and Nonracial Causes*, 68 Am. Soc. Rev. 412 (2003).
[48] Guinier *supra* note 41 at 102
[49] *Id* at 103

of the racial-hierarchical structure that already dominates all aspects of American culture is more predatory than envisioned; it is precedential to the racial obliteration of Black people.

In examining the re-converging of interests between elite whites and poor and working-class whites, I will begin focus on Donald Trump's Presidential campaign and administration to pragmatize the argument that the current era of subordination is aiming for racial obliteration.

It is a commonality in reviewing Donald Trump's Presidential campaign and administration to consider his appeals to poor and working-class white rhetoric to foster his political leadership. During his time in office, former President Trump agitated racial tensions in America, recasting pressures between Black people and their white counterparts. Scholar have largely referred to the election of Donald Trump as whitelash from the majority for the election of the first Black President, Barack Obama, for two consecutive terms.[50] The following arguments are not to dispel any current understandings of racial tropes in circulation, but in reexamining dominant American culture and subordination, for which remained prevalent under the Obama administration and beyond, but to show the predictions derived from CRT on the various shortcomings of racial justice in the post-*Brown* era were made with paramount accuracy, as if these theorem were whispers from the God Apollo and Derrick Bell was his oracle and priest.[51]

Social Science identifies many variants contributing to the success of Donald Trump's Presidential campaign. Some scholars refer to it as an amalgamation of sociopolitical and economic dynamics, including "an ongoing class struggle in the context of increasing economic

[50] Terry Smith, *Whitelash: Unmasking White Grievance at the Ballot Box* (Penguin Random House, 2018)
[51] Kurt Latte, *The Coming of the Pythia*, 33 Harvard Theological Review 9–18 (1940)

and social inequality, with a focus on the 'revenge' of a downwardly mobile white working class that feels ignored by progressive elites,"[52] and "racism and race resentment in a post-Obama era."[53] While Lani Guinier has previously established poor and working-class white resentment of the elite white class after the *Milliken v. Bradley*[54] decision, which held that only schools that practiced intentional desegregation were constricted by desegregation plans, and affected the lower class unable to participate in white flight and continued through the affirmative action era.[55] In applying Bell's framework to these conclusions, I argue that Donald Trump's campaign was the catalyst of interest re-convergence between elite whites and poor and working class whites. Furthermore, when analyzing voter demographics during the Trump campaign, which was made up of mostly middle-class whites, it was his appeals to the poor and working-class white people that tipped the scales in his favor[56], which provides quantitative evidence of the re-converging of interests of between elite whites and poor and working-class whites.

As the Trump campaign and election was a catalyst for interest re-convergence, his success did not provide whites the satisfaction to revel, or enough boredom to antagonize their winnings as a Lion would over an easy kill. And while this success is evidentiary of interest re-convergence, Former-President Trumps issuing of Executive Order 135 as white Republican President with a majority Republican senate is evidentiary of racial obliteration. The subordinate position of Black people in American society had not shifted much within or beyond the social realm during the Obama administration, yet whites saw his Presidency as a blatant attack on their supremacy.

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[52] Michèle Lamont, et al, *Trump's Electoral Speeches and His Appeal to American White Working Class*, 68 British J. Socio S1, S154 (2017)
[53] *Id*.
[54] 418 U.S. 717 (1974).
[55] Guinier *supra* note 41 at 101
[56] Lamont, et al, *supra* note 50

Insomuch, former-President Trump's Executive Order acquired support from whites of all class identifications, and they began advocating for the eradication of these "divisive concepts" from public education. Whites enforcing variations of this Executive Order and its rhetoric are looking beyond CRT to prohibit any instruction of racial identity in K-12 and collegiate education. While considering the stagnancy of Black people under subordination, this elimination of education of racial identity is classified as what I label racial obliteration, stemming from this elimination of racial concepts and identity.

Emerging from this chaos is name specific bans on books and scholars in a regime to which I compare to the effects of communist labeling during the McCarthyism era.[57] Toni Morrison, Alice Walker, and Kimberlé Crenshaw alike have been labeled as radical extremist by white lawmakers and their works have been banned from schools. The effects of this legislation has trickled onto the higher education spheres. Diversity and inclusion offices have been eradicated from colleges across the nation. In fact, Harvard recently faced a challenge to its practice of race-conscious admissions policies and awaits a decision from the Supreme Court.[58] As the interest of elite whites and poor and working-class whites re-converge in a structure that already positions Black people as subordinates, the only goal that can be interpreted of this elimination of CRT and diversity is racial obliteration. As the originators of CRT advocated for juridical enforcement of remedies to the pollical, economic, social inequities of Black people, their white counterparts invoked colorblindness into pragmatism. Now, as their predictions of the harms that society

[57] *See generally* Jeff Woods, *Black Struggle, Red Scare: Segregation and Anti-Communism in the South* (Louisiana State University Press 2004).
[58] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), cert. denied, 142 S. Ct. 401 (2021).

would face are manifesting, their legacies are being eliminated from the intuitions that produced their work.

Conclusion

In analyzing the eradication of CRT and diversity, one could attempt to tether this phenomenon to Presidential administrations, but, I argue the occurrence of such phenomena under the current democratic rule is evidentiary of white interest re-convergence. Derrick Bell and other CRT scholars understood both the shortcomings of adjudications involving racial equity and the societal implications of these rulings. In theorizing these shortcomings, Bell implicitly distinguished how Black rights are both granted and repealed. Furthering Bell's arguments to analyze the repeal of Black rights by the dominant American culture and the continued subordination of Black people can justify white supremacists' goal of racial obliteration. Where a society has acclaimed identity as a tyrannical force of cultural erasure, particular attention should be paid to the political majority and its agendas. As Lani Guinier states in her critique of the exclusionary functions of our majority-rules democracy, "we need to focus on creating a more inclusive and deliberative democracy that values and respects the voices of all citizens, not just the majority."[59]

[59] Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* (Free Press 1994).

Applicant Details

First Name	**Laura**
Last Name	**Fisher**
Citizenship Status	**U. S. Citizen**
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Applicant Education

BA/BS From	**University of North Carolina-Chapel Hill**
Date of BA/BS	**May 2015**
JD/LLB From	**University of North Carolina School of Law** **https://law.unc.edu/**
Date of JD/LLB	**May 13, 2024**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**North Carolina Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

McKinney, Ruth
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

LAURA FISHER

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(919) 608 9456 | lfisher@unc.edu

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year law student at the University of North Carolina, and I am writing to apply for a clerkship in your chambers for the 2024-2025 term. My resume, writing sample, law school transcript, and letters of recommendation are submitted with this application.

Please do not hesitate to contact me at the above phone number or email address if you need any additional information. Thank you for your consideration. I look forward to hearing from you.

Sincerely,

LAURA FISHER

820 W Knox Street, Durham, NC 27701
(919) 608 9456 | lfisher@unc.edu

EDUCATION

University of North Carolina School of Law, Chapel Hill, North Carolina
Juris Doctor, expected May 2024
Cumulative GPA: 3.761, top 15% (GPA cutoff for top 10% is 3.776)
Activities:

- *North Carolina Law Review*, Comments Editor; Forthcoming Publication: *With More Power Comes More Responsibility: The North Carolina Supreme Court Acknowledges Nurse Autonomy, but Clearer Guidelines Surrounding Liability are Needed*
- Honors Writing Scholar (research and writing mentor for first-year students)
- Certificate of Merit (highest class grade), Research, Reasoning, Writing, and Advocacy, Fall 2021 and Spring 2022
- 75 hours of pro bono participation: multi-state statutory research of disability benefits, multi-state statutory research of mental illness definition, assessment of prison conditions across the country

University of North Carolina at Chapel Hill, Chapel Hill, North Carolina
Bachelor of Arts, Journalism and Mass Communications, May 2015
Bachelor of Science, Information and Library Science, May 2015
Cumulative GPA: 3.762, Dean's List

EXPERIENCE

The Honorable James Andrew Wynn, Raleigh, North Carolina
Judicial Extern, Fall 2023

Patterson Harkavy LLP, civil rights and employment law firm, Chapel Hill, North Carolina
Summer Associate, Summer 2023

Disability Rights North Carolina, Raleigh, North Carolina
Legal Intern, June 2022 – August 2022
Drafted demand letters, research memos, and a complaint; researched legal issues including tenant rights, service animal rights, and worker rights; examined public records to find evidence for litigation team; presented research findings in co-counsel litigation meetings; developed written public resources about the rights of people with disabilities; conducted intake calls with clients and provided them with legal resources; attended hearings; monitored treatment facilities for rights violations.

Big Duck, communications firm for nonprofits, Brooklyn, New York
Senior Strategist, June 2019 – July 2021
Strategist, September 2016 – May 2019
Junior Strategist, August 2015 – August 2016
Developed communications recommendations for clients; conducted research including surveys, interviews, and focus groups; synthesized research to inform recommendations; wrote communications plans and research briefs; collaborated with writers to create messaging documents; supported diversity, equity, and inclusion efforts by facilitating meetings and contributing to planning conversations.

INTERESTS

Disability and health justice, nonprofits, running, cats

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Unofficial Law School Transcript

Note to Employers from the Career Development Office: Grades at the UNC School of Law are awarded in the form of letters (A, A-, B+, B-, C, etc.). Each letter grade is associated with a number (A = 4.0, A- = 3.7, B+ = 3.3, B = 3.0, etc.) for purposes of calculating a cumulative GPA. An A+ may be awarded in exceptional situations. For more information on the grading system, including the current class rank cutoffs, please contact the Career Development Office at (919) 962-8102 or visit our website at https://law.unc.edu/careers/for-employers/grading-policy-faq/

Student Name: Laura Fisher

Cumulative GPA: 3.761

Course	Description	Term	Grade	Units
LAW 204	CONTRACTS	2021 Fall	B+	4.00
LAW 209	TORTS	2021 Fall	A-	4.00
LAW 295	RES,REAS,WRIT,ADVOC I	2021 Fall	A	3.00
LAW 201	CIVIL PROCEDURE	2021 Fall	B+	4.00
LAW 205	CRIMINAL LAW	2022 Spring	A-	4.00
LAW 296	RES,REAS,WRIT,ADVOC II	2022 Spring	A	3.00
LAW 207	PROPERTY	2022 Spring	A-	4.00
LAW 234A	CONSTITUTIONAL LAW	2022 Spring	A	4.00
LAW 242	EVIDENCE	2022 Fall	A+	4.00
LAW 266F	PROF RESPONSIBILITY	2022 Fall	A-	3.00

LAW 343	DISABILITY LAW	2022 Fall	A+	3.00
LAW 220	ADMINISTRATIVE LAW	2022 Fall	A	3.00
LAW 244	FAMILY LAW	2023 Spring	B+	3.00
LAW 206	CRIM PRO INVESTIGATION	2023 Spring	B+	3.00
LAW 444	PSYCHIATRY AND LAW	2023 Spring	A	3.00
LAW 228	BUSI ASSOCIATIONS	2023 Spring	A-	4.00

GPA Calculation	
Total Grade Points	210.600
/ Units Taken Toward GPA	56.000
= GPA	**3.761**

April 3, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is a joy to have this opportunity to recommend Laura Fisher for your most serious consideration for a clerkship in your chambers upon her graduation from the University of North Carolina School of Law in the Spring of 2024.

Throughout my twenty-year career as Director of UNC Law's legal research and writing program, I had the opportunity to work closely with hundreds of students as they developed their skills as lawyers. Over those years, I rarely worked with a student whose organizational skills, eye for detail, ability to write clearly and accurately, and ability to work well with others were as well-developed as Laura's.

I met Laura in the 2021-22 school year when, as a 1L, she volunteered to work with me and a cadre of fellow 1Ls on a major pro bono project involving state employees' disability rights in North Carolina. The students' assignment was to survey how surrounding states addressed the need to recoup inadvertent overpayments of state funds. We held weekly meetings attended by one of UNC Law's assistant library directors to compare what students were finding. By Week #2, Laura had developed not only a systematic approach to her research, but also a sophisticated method for recording her findings. The entire team found her approach so useful that we adopted it, on the spot, as the model for the team to follow.

Before coming to law school, Laura had pursued double undergraduate majors – one in Journalism and one in Library Science – and earned an impressive 3.762 undergraduate GPA. I have thought that this background is what has contributed not only to her interest in thorough legal research and careful, clear writing, but also what has allowed her to make the transition to legal research and writing so smoothly.

Laura is now in the top 10% of her class and is a member of the *North Carolina Law Review*, which has opted to publish her recently submitted article. These academic achievements are remarkable, but I am perhaps even more impressed by Laura's ability to achieve these goals while keeping her life balanced and her warm personality intact.

In summary, I recommend Laura Fisher to you for your most serious consideration. She is multi-talented, highly intelligent, personable, curious to learn, and a born team player. I hope this perspective is helpful and remain available for any questions that you may have about Laura and her potential.

Sincerely,

Ruth Ann McKinney
Clinical Professor of Law Emerita
Cell: 919.215.5299
Cell: ramckinnunc@gmail.com

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to offer my strong support of Laura Fisher's application for a clerkship in your chambers. Laura was in my Research, Reasoning, Writing, and Advocacy II class during the spring of 2022, where she earned a final course grade of "A," as well as the High Merit Certificate for Outstanding Performance, which goes to the person in each section with the strongest performance. The course was three credits, and students submitted six substantial writing assignments for me to review. I also met with all students at least five times to discuss their research and writing. As a result, I have a good sense of Laura as a student and as a person.

Laura is a talented writer with very strong legal research and skills. She is also friendly, easy to work with, and cool under pressure.

In my course, Laura wrote an office memo, two motion memos and an appellate brief. The office memo, first motion memo, and appellate brief were ungraded, giving students an opportunity to practice their legal research and writing skills. But the final motion memo was worth 65% of their grades, and students completed it on their own. They received a packet of law on an unfamiliar federal topic, plus filings from a fictional case in district court, and then they wrote a memorandum in support of a motion. In Laura's class, the assignment was a trade dress case and a motion for summary judgment by an alleged infringer. Students received no individual guidance from me; all I did was answer general questions in class or in a document shared with the entire class.

Laura's final motion memo was a pleasure to read from start to finish. In particular, she wrote excellent illustrations—descriptions of cases that applied the key trade dress infringement rules and that she could then use to compare and contrast with her client's facts. She fit the illustrations together to show how the rules worked in practice, including important contextual details when describing the cases' reasoning. She also made smart choices about which cases to describe, choosing the ones that were most factually similar regardless of outcome.

Laura also demonstrated excellent legal research skills. For the graded research assessment, she had to research the Court Interpreters Act, answer questions about the Act, and describe her research processes. Both her research results and process were nearly flawless. Again, she excelled at finding and describing factual examples from case law that showed how the statutory language would apply to her client's facts.

Laura is a delight to work with. She contributed frequently to class discussions and was always prepared. I could rely on her to answer questions or share her approach to solving whatever problem we were working on in class. Outside of class, Laura worked hard to master the research and writing skills I teach. Although most assignments in my class are not graded, Laura always turned in polished and professional work, regardless of the assignment's graded or ungraded status. As I reviewed our email correspondence to write this letter, I saw again how conscientious Laura was when preparing to meet with me about her writing. I ask my students to email me questions about their drafts before we meet; this helps me know what each student wants to focus on and whether it matches what I think that student should focus on. Laura's questions were insightful. Early in the spring semester, she asked about how to translate concepts she had learned in the fall semester from a different professor into her new writing with me. She also asked detailed questions about the nuances of cases that she had used (or decided not to use) in her drafts.

In closing, I am confident that Laura will be an immediate asset to your chambers. She is very bright, writes beautifully, has strong interpersonal skills, accepts feedback well, and works effectively on her own and with others. I highly recommend her without reservation.

Sincerely yours,

Alexa Z. Chew
Clinical Professor of Law

Alexa Chew - achew@email.unc.edu - 919.843.6682

Bradley J. Bannon
Jennifer L. Bills
Christopher Brook
Burton Craige
Narendra K. Ghosh
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To Whom It May Concern:

I write to offer my highest, most enthusiastic, and unequivocal recommendation in support of Laura Fisher's application for a clerkship. Having clerked in Federal District Court in 2001-2002 in Portland, Maine, I appreciate the necessary skills a law student must possess to excel in such a position, and anyone serving in the Judiciary will be lucky to have Ms. Fisher as a law clerk. I have come to know Ms. Fisher's outstanding research and writing acumen, as well as her superb critical thinking and insightful analysis, as she was a star student in my Disability Law Class in the Fall 2022 semester. As an Adjunct Professor at UNC Chapel Hill School of Law since 2016 and an attorney for over twenty years, I have encountered only a handful of law students whose stellar work ethic, sharp intelligence, and calm yet confident demeanor show that they would provide strong and reliable contributions in chambers. Ms. Fisher's wisdom and skills are top notch.

Ms. Fisher chose a challenging topic for her research paper in my intensive, Rigorous Writing Experience (RWE) seminar this year. She analyzed economic principles and conducted an international comparison of laws and policies related to people with disabilities. Ms. Fisher effectively utilized primary and secondary sources to create a cogent and interesting paper, which was a pleasure to read. Her citations were unerring, and her legal writing evidenced a mature voice. I could also reliably count on Ms. Fisher to contribute to lively class discussions. Ms. Fisher came well-prepared to every class meeting and contributed valuable and constructive commentary on caselaw, as well as perceptive insights on public policy issues. Additionally, Ms. Fisher eagerly sought criticism on her writing throughout the semester, and took full advantage of office hours, seeking guidance to strengthen her analysis and persuasive writing. In addition to being extremely intelligent, hard-working, and dedicated to her studies, Ms. Fisher appears to be a very well-rounded individual. Ms. Fisher volunteers many pro bono hours as a result of her commitment to justice for people with disabilities. Her talent has been widely recognized, garnering her a seat on the law review and distinctions including earning the highest grade in multiple classes.

Ms. Fisher will make a magnificent law clerk, and I encourage you to make her a part of your team. She is a bright light, a gifted student of the law, and she brings a pleasant and collegial attitude, with a keen sense of justice. Her candor and humor make her an ideal colleague, and I encourage you to give her the opportunity to serve in your chambers.

Please feel free to contact me if I may provide further information.

Very Sincerely Yours,

Jennifer L. Bills, Esq.

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This motion for summary judgment was written for a class in legal research and writing taken in the Spring of 2022. In this exercise, I represented the defendant. This was a closed universe assignment, and we were limited to using eight authorities which were a combination of cases and statutes. I removed the introduction and conclusion pages from the motion, so this writing sample only includes the statement of facts and my argument.

Statement of Facts

Rosa Cruz and her wife Ernestine began Hector's Restaurants as a way to celebrate the spirit of Cruz's deceased uncle and to feature authentic Mexican cuisine. (Def.'s Mot. Summ. J. Ex. B, 7:11-14.) Hector's flagship restaurant opened in Tempe, Arizona, in 2015. (Ex. B, at 4:17-21.) Hector's has expanded and now there are three new restaurants in Phoenix, Scottsdale, and Mesa. (*Id.* at 10:7.)

The Phoenix store struggled to find its footing and become financially stable. (*Id.* at 10:16-20.) Specifically, Hector's was selling far fewer authentic Mexican dishes in Phoenix than in its flagship store. (*Id.* at 12:5-8.) The restaurant attempted to boost sales by celebrating Mexican heritage through theme nights, but none of them caught on. (*Id.* at 12:11-19.) Eventually, out of fear of having to close, the Phoenix restaurant was forced to shift from being an authentic Mexican restaurant to being an American-style Mexican restaurant. (*Id.* at 13:12-22.) As part of this strategy, it began selling triangle-shaped menu items. (*Id.* at 14:5-9.) Specifically, it marketed "Triangle Taco Thursday," a weekday on which customers could buy triangle-shaped tacos. (*Id.* at 18:12-27.) Eventually, it had more customers on the weeknights that it sold triangle-shaped tacos than on other weeknights. (*Id.* at 19:1-2.) One of Hector's owners attributes that increase to customers appreciating the novelty of using triangle-shaped tortillas to create these menu items. (*Id.* at 19:1-4.) The Phoenix store has now stabilized financially and is no longer at risk of closing. (*Id.* at 10:17-21.)

Trilátero Tex-Mex first opened in 2007 in California and its owners have since expanded to open twenty additional restaurants. (Def.'s Mot. Summ. J. Ex. A, at 4:16-17,

5:5-6.) Since it opened, it has been serving certain menu items in the shape of triangles as opposed to the traditional round tortilla shape. (Ex. A, at 10:1-4.) The triangle shape is used by the restaurant as a tool to draw people in. (*Id.* at 14:10-12.) In fact, when creating the triangle-shaped tortilla concept for the restaurant, the owners specifically implemented it as a tool to make it stand out from the competition in the eyes of customers. (*Id.* at 8:26.)

The triangle tortilla concept is beneficial to the business. One of Trilátero's owners admits that the restaurant "would not have survived" without the concept. (*Id.* at 14:9.) Customers also benefit from the tortilla shape. When customers comment on the triangle-shaped tortillas, they usually say something along the lines of the tortillas creating a "fun" experience. (*Id.* at 18:25-30.) Sometimes, but not often, customers say that the shape makes the restaurant's tacos taste better. (*Id.* at 19:1-8.) Ten percent of the restaurant's Yelp! and Google reviews mention that the food tastes better because it is in a triangle shape. (*Id.* at 19:17-19.) Sometimes, but not often, customers also mention that they like that filling falls out of the tacos because of the triangle shape, giving them more to scoop up with chips later. (*Id.* at 19:1-8.) Lastly, some customers mention enjoying the ratio of filling to tortilla that the triangle shape creates. (*Id.* at 19:19.)

The triangle tortillas are part of Trilátero's marketing as well. (*Id.* at 15:13-21.) It primarily uses the slogan "it tastes better in a triangle" in its advertising materials. (*Id.* at 15:13-18.) Trilátero also ran an advertising campaign touting the benefit of the items inside the taco falling out onto the plate to be scooped up later. (*Id.* at 17:18-20.) These advertisements featured video of filling falling out of the taco, only to later be scooped up

with a tortilla chip. (*Id.* at 17:18-25.) The commercial implied that when filling falls out of the tortillas because of their shape, there is a bonus after your meal. (*Id.* at 18:1-3.)

Trilátero's process for making the triangle tortillas is similar to that of making round tortillas, requiring just one additional step. (*Id.* at 13:4-17.) Round tortillas are made with an automatic tortilla machine. (*Id.* at 12:9-14.) After the tortillas are made, they are cut into triangles. (*Id.* at 13:4-6.) This adds only one or two seconds per tortilla and the labor of the person cutting the tortillas into triangles. (*Id.* at 13:14-17.) There is no dough loss or added food cost associated with turning round tortillas into triangle tortillas. (*Id.* at 13:8-15.)

Trilátero sued Hector's for allegedly violating the federal Lanham Act. (Compl. ¶ 3.) Specifically, Trilátero alleges that its triangle-shaped tortillas constitute trade dress. (Compl. ¶ 23.) It claims Hector's violated that trade dress. (Def.'s Mot. Summ. J. 1.) There is no evidence that Trilátero has registered its trade dress with the United States Patent and Trademark Office. Hector's moved for summary judgment because Trilátero failed to meet its burden to show that the use of triangle-shaped tortillas is not functional, and therefore Trilátero cannot make a case for trade dress infringement. (*Id.*)

Argument

I. Summary judgment should be granted for Hector's because there is no genuine dispute of material fact supporting the finding that triangle-shaped tortillas are not functional.

Summary judgment should be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To make this determination, the trial court should view the evidence in the light most favorable to the non-moving party. *Disc Golf Assoc., Inc. v. Champion Discs, Inc.*, 158 F.3d 1002, 1005 (9th Cir. 1998).

The Lanham Act provides a cause of action to one injured when a person uses "any word, term name, symbol, or device, or any combination thereof" which is likely to cause confusion about the "origin, sponsorship, or approval of his or her goods." 15 U.S.C. § 1125(a)(1)(A). This protection extends to trade dress. *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29 (1997). Trade dress includes the overall look of a product including features such as its design and shape. *Id.* at 28. When this overall look identifies the product with the source, it is a trade dress. *Id.*

One cannot recover for infringement of a trade dress unless they prove that 1) the feature in question is nonfunctional, 2) the feature is distinctive, and 3) there is likelihood of confusion among consumers. *Disc Golf,* 158 F.3d at 1005. Hector's argument focuses exclusively on the functionality element. (Def.'s Mot. Summ. J. 1.) In an action for trade dress infringement, when the trade dress is not registered, the party asserting trade dress protection has the burden of proving that the feature sought to be protected is not functional. 15 U.S.C. § 1125(a)(3).

A feature is functional if it is essential to the use or purpose of the product or if it affects said product's cost or quality. *TrafFix*, 532 U.S. at 34. This functionality doctrine exists to prevent businesses from inhibiting competition by controlling a useful product feature. *Id.* at 33. Exclusive use of a functional feature would put competitors at a significant non-reputation-related disadvantage. *Id*. at 34. Courts weigh three factors to determine whether a product is functional: "(1) whether the design yields a utilitarian advantage, (2) whether advertising touts the utilitarian advantages of the design, and (3) whether the particular design results from a comparatively simple or inexpensive method of manufacture." *Disc Golf*, 158 F.3d at 1006. These factors are weighed collectively to determine if a feature is functional. *Id.*

Triangle-shaped tortillas are functional because they have all three factors in *Disc Golf's* three-factor test. The tortillas have several utilitarian advantages including drawing customers into restaurants, improving food taste for some customers, and bettering the eating experience for some customers. Trilátero's marketing explicitly and implicitly touts the utilitarian advantages of taste and experience improvement. Lastly, the triangle-shaped tortillas have a relatively simple method of manufacture when compared to round tortillas. All three factors weigh in favor of functionality, proving that the triangle shape is functional and therefore not protectable trade dress.

A. Triangle-shaped tortillas yield several utilitarian advantages.

A product design has a utilitarian function when there is no evidence of any non-utilitarian design choices and the product's appearance follows from the product's

function. *Talking Rain Beverage Co. v. S. Beach Beverage Co*., 349 F.3d 601, 603 (9th Cir. 2003). The inquiry about utility should not assess the utility of the whole product but should instead focus on the utility of the feature in question. *Disc Golf*, 158 F.3d at 1008. To be deemed functional, a feature only needs to have some utilitarian advantage, it need not have multiple utilitarian advantages. *Id.* at 1007.

When determining if there are utilitarian advantages of a product feature, the Ninth Circuit has assessed if there is a link between the feature's design and any useful benefits of said feature. *Talking Rain*, 349 F.3d at 603. In *Talking Rain*, the court held that the recessed grip design of a water bottle was functional. *Id*. at 602. There, the court determined that the grip design was not merely aesthetic—it served the utilitarian functions of helping users hold the water bottle and allowing the bottle to retain its shape for reuse. *Id.* at 603. Conversely, the Ninth Circuit held that the trapezoidal armrest shape and the one-piece construction of the seat and back of an Eames chair were primarily aesthetic design choices, yielding no utilitarian advantage. *Blumenthal Distrib., Inc. v. Herman Miller, Inc.,* 963 F.3d 859, 863 (9th Cir. 2020). There, the designers of the chair were likened to sculptors, developing the specific chair features in question for the non-utilitarian purpose of visual impact alone. *Id.*

Other circuits have looked to how a product is experienced to assess if a particular feature is functional. *Dippin' Dots, Inc. v. Frosty Bites Distrib., LLC,* 369 F.3d 1197, 1206 (11th Cir. 2004). No Ninth Circuit case addresses taste improvement as a functional benefit of a product feature, but the Eleventh Circuit considered it. *Id.* In *Dippin' Dots*, the plaintiff sued for trade dress regarding the design of its frozen ice cream product. *Id.*

at 1201. The court held that the product design was functional. *Id.* at 1207. There, the product's size had a direct impact on the taste of the ice cream, and the court held that the benefit of better taste weighed in favor of functionality. *Id.* at 1206. The court also brought in evidence that customers believed the shape of the product enhanced the ice cream's flavor to support the case for functionality. *Id.*

Here, the triangle tortilla shape serves several utilitarian functions, the first of which is drawing customers into restaurants because of the design novelty. Similar to the recessed grip design in *Talking Rain*, the triangle-shaped tortilla design has a purpose that goes beyond aesthetics. The triangle shape is used as a strategy to get customers in the door. (Ex. A, at 14:10-12.) For the restaurants who have implemented this design, it has been successful—customers are in fact drawn in because of the triangle tortilla. (*See* Ex. A, at 14:9; Ex. B, at 19:1-2.) Unlike the armrest design in *Herman Miller,* the triangle design has been implemented for reasons other than visual impact. The design of the tortilla follows its function—from its inception it has been a tool of differentiation and customer attraction. (Ex. A, at 8:25-26.)

The triangle-shaped tortillas need not serve more than one utilitarian purpose to be deemed functional, but in this case, they do. One additional function is enhanced taste. Similar to the size and shape of the ice cream in *Dippin' Dots*, the triangle shape of the tortillas improves the food's taste for some customers. (*Id.* at 19:1-8.) Another utilitarian advantage is that the triangle shape improves the eating experience in a number of ways. For some, the triangle shape creates a "fun" experience. (*Id.* at 18:25-30.) For others, the triangle shape creates a ratio of filling to tortilla that is appreciated. (*Id.* at 19:18-19.)

Lastly, some customers have commented on enjoying the fact that filling falls out of the side of triangle-shaped menu items. (*Id.* at 19:1-8.) Just as the recessed grip in *Talking Rain* improved customer experience by making the water bottle easier to grip, the triangle tortillas improve customer experience by making eating more enjoyable.

While Trilátero may argue that only some customers have commented on the taste and experience enhancement, the triangle shape only needs to have some utilitarian advantage to be deemed functional. Here, that the triangle-shaped tortillas provide some customers with an enhanced taste and experience, coupled with the fact that the tortillas are a tool to attract customers, proves that there are multiple utilitarian advantages of the triangle shape. Thus, this factor weighs in favor of the triangle-shaped tortillas being functional.

B. Trilátero's advertising explicitly and implicitly touts the utilitarian advantages of the triangle tortilla.

There is strong evidence that a product feature is functional if the seller advertises any of the utilitarian advantages of the feature. *Disc Golf*, 158 F.3d at 1008. The utilitarian advantages can be advertised in an implicit or explicit way. *Id.*

The Ninth Circuit has assessed the language and visuals within advertisements to gauge if the utilitarian advantage is featured. *Id.* In *Disc Golf*, a company alleged that its competitor infringed its trade dress for the parabolic chain design of a disc golf target. *Id.* at 1004. The court held that the chain design had the utilitarian function of improving catchability. *Id.* at 1007. The court then looked at the company's advertising, holding that the combination of photography showing a disc hitting the chain and being caught in the

basket with language about catchability, implicitly highlighted the functional value of the chain. *Id.* at 1008. Similarly, in *Talking Rain*, the court held that the water bottle's slogan "Get a Grip!" highlighted the utilitarian function of easy grip. *Talking Rain,* 349 F.3d at 604. There, the court held that even though the slogan was a double-entendre that subtly emphasized the grip, the functional value was still clear. *Id.*

The Ninth Circuit does not discuss advertising that uses comparative language, but this concept was discussed by the Seventh Circuit. *Bodum USA, Inc. v. A Top New Casting, Inc*., 927 F.3d 486, 493 (7th Cir. 2019). The Seventh Circuit uses the same three-factor test to assess functionality that is employed in Ninth Circuit cases. *Id.* at 492. In *Bodum*, the court determined that the design features of a coffee maker were not functional. *Id.* at 488. There, the court held that Bodum's advertisements did not boast functional features partially because they did not use comparative language, that is, they never suggested that the design features in question made the coffee maker work better than other options. *Id.* at 493.

Here, Trilátero's marketing explicitly and implicitly touts the utilitarian features of triangle-shaped tortillas. Trilátero primarily uses the slogan, "it tastes better in a triangle." (Ex. A, at 15:13-18.) This slogan explicitly highlights the utilitarian function of taste improvement. Unlike the slogan in *Talking Rain*, there is no double-entendre or subtly to this message—one utilitarian advantage of the triangle shape is front and center. Additionally, unlike in *Bodum,* there is comparative advertising at play, weighing in favor of functionality. "It tastes better in a triangle" indicates that the triangular shape makes the food taste better than other options. Lastly, similar to the advertisements in

Disc Golf, Trilátero's commercials touting the benefit of items inside the taco falling out onto the plate implicitly highlights the utilitarian advantage of enhanced dining experience. These commercials pair visuals with language that subtly reinforces the advantage of having filling fall out of the tacos. (*Id.* at 17:18-26.) As was the case in *Disc Golf*, this implicit highlighting of a benefit is enough to show functionality.

The slogan "it tastes better in a triangle" much more explicitly touts a utilitarian advantage than advertising in other Ninth Circuit cases. In those other cases, the advertising factor of the *Disc Golf* test still weighed in favor of functionality, despite the utilitarian advantage being marketed more implicitly. The explicit slogan, coupled with the additional advertising that Trilátero does to implicitly market a second utilitarian advantage of enhanced eating experience, proves that the advertising factor of the *Disc Golf* test weighs strongly in favor of functionality.

C. The triangle tortillas are relatively simple to manufacture.

A feature is likely functional when its method of manufacture is comparatively simple. *Talking Rain,* 349 F.3d at 604. Courts have looked for evidence regarding whether or not the product was "relatively simple or inexpensive to manufacture" in assessing functionality. *Disc Golf*, 158 F.3d at 1008. In *Herman Miller*, the court used testimony that spoke to the "specialized technical equipment" needed to manufacture the trapezoidal frame and one-piece seat and back. *Herman Miller*, 963 F.3d at 864. The court determined that using this equipment proved that the design features did not use a

simple or inexpensive method of manufacture, and therefore this factor weighed in favor of nonfunctionality. *Id.*

Unlike the Ninth Circuit, the Seventh Circuit has explicitly analyzed the difference between production of two products to assess comparative simplicity. *Bodum*, 927 F.3d at 494. In *Bodum*, the court considered testimony about the expense of making a coffee maker—the Chambord—with the design features in question. *Id*. It compared the Chambord's cost of production to another coffee maker, the Bistro, without said features, noting that the Bistro cost less than half of what it costs to produce the Chambord. *Id.* The Bistro also used less material in production. *Id.* Because the Chambord was not comparatively simple to manufacture, this weighed in favor of nonfunctionality. *Id*.

Here, evidence suggests that the process for making triangle tortillas is relatively simple when compared to making round tortillas. Turning round tortillas into triangle tortillas only adds one to two seconds per tortilla. (Ex. A, at 13:4-17.) When compared with the significant difference in cost of production between coffee makers in *Bodum*, this additional one to two seconds needed to produce triangle tortillas is negligible. Unlike in *Bodum*, the triangle tortillas do not use more material—there is no dough loss associated with the process. (*Id.* at 13:8-15.) Because the process to make triangle tortillas takes only slightly more time and no additional material, there is evidence that the process is relatively simple compared to making round tortillas.

Unlike the process in *Herman Miller*, turning round tortillas into triangles does not require any specialized equipment. While Trilátero does use an automatic tortilla-maker, this machine is not used specifically to create the triangle-shaped tortillas. Instead, it is

used to make round tortillas which are then cut into triangles by hand. (*Id.* at 12:9-14, 13:4-7.) Conversely, in *Herman Miller*, the specific design features in question—the trapezoidal frame and the seat—required specialized equipment.

The evidence shows that all three factors of utility, advertising, and simplicity of manufacture weigh in favor of functionality. There is no genuine dispute of material fact supporting the finding that triangle-shaped tortillas are not functional. This demonstrates that Trilátero has not met its burden of proving that triangle tortillas are not functional.

Applicant Details

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Applicant Education

BA/BS From	**University of Georgia**
Date of BA/BS	**May 2021**
JD/LLB From	**Washington and Lee University School of Law** **http://www.law.wlu.edu**
Date of JD/LLB	**May 1, 2024**
Class Rank	**30%**
Law Review/Journal	**Yes**
Journal(s)	**Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just the Beginning Organization**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 21, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
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Dear Judge Walker:

Please accept this letter and enclosed materials as an application for a clerkship in your chambers for the 2024-2025 term. I am a rising third-year law student at Washington & Lee interested in an opportunity to assist the work of your Court while refining the practical skills required to practice law in a collaborative environment.

My experiences—including working for Virginia Attorney General's Office and as a Research Assistant, writing a Note for Law Review, and working on W&L's Executive Committee—have developed the skills necessary to provide apt assistance in your chambers. Through these positions, I have learned the attention to detail necessary to produce quality, concise legal writing and research.

In addition to having the skills necessary to assist the work in your chambers, I also desire to increase the visibility and acceptance of the disabled community within the legal profession.

Enclosed please find my complete application. My recommendations from Professor Josh Fairfield, Assistant AG Erin McNeill, and Assistant AG Chris Bernhardt will be uploaded by W&L's Career Services Staff.

If there is any other information that would be helpful to you, please let me know. Thank you for your time and consideration.

Respectfully,

s/ Lucie Fisher